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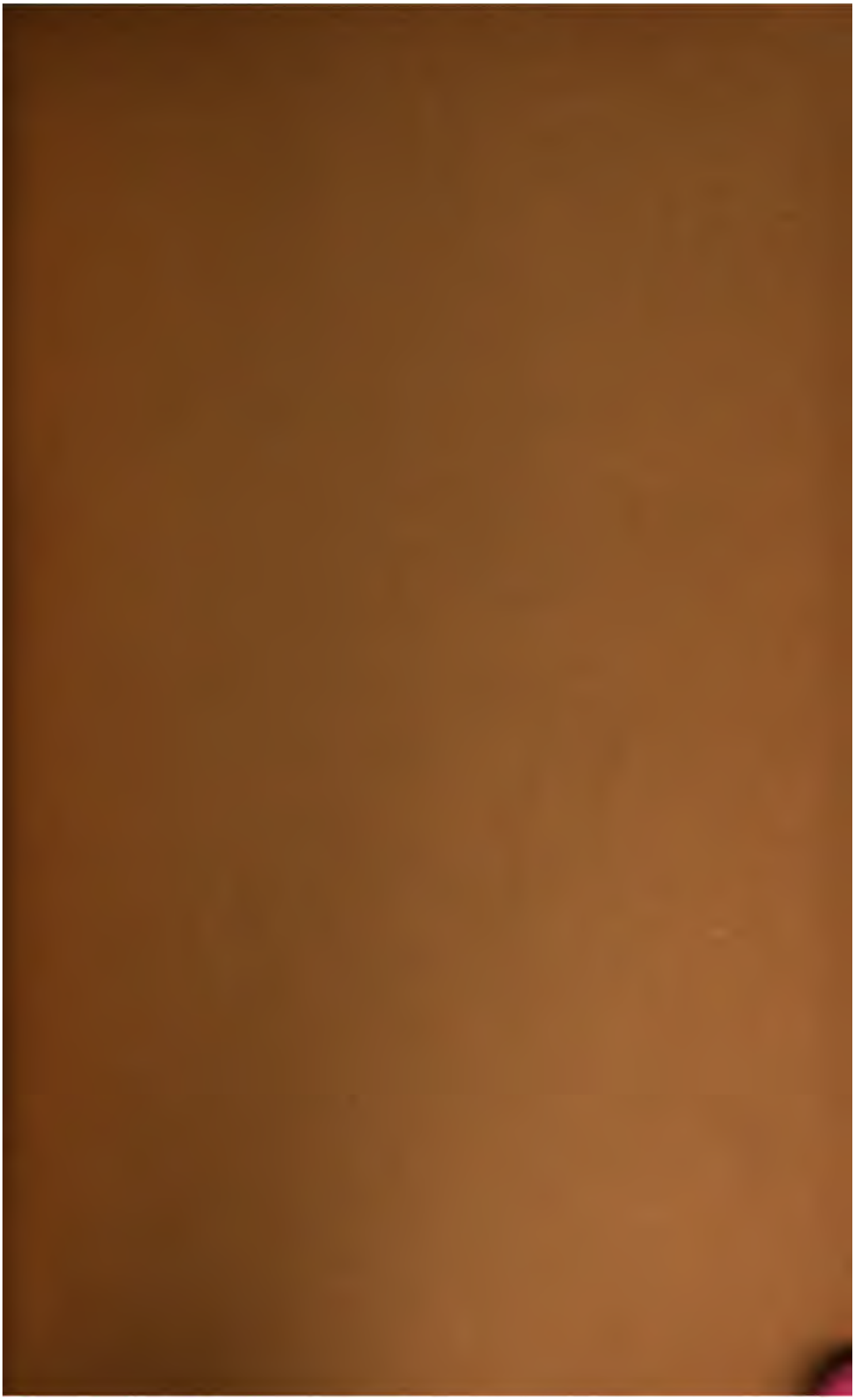

6

NATIONAL BANK CASES,

June 13

CONTAINING

ALL DECISIONS

OF THE

UNITED STATES SUPREME COURT,

AND

DECISIONS OF THE STATE COURTS,

RELATING TO

NATIONAL BANKS,

From 1881 to 1889.

WITH

NOTES AND REFERENCES.

By IRVING BROWNE,
Editor of "The Albany Law Journal" and "The American Reports."

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CASES DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES, EX REL. CITIZENS' NATIONAL BANK OF LOUISIANA, v. KNOX.

(102 U. S. 422.)

Stockholders — liability for deficiency of insolvent bank.

Under the National Bank Law (U. S. R. S., § 5151), in case of insolvency of a bank and a deficit, each stockholder may be assessed such sum (not exceeding an amount equal to the par value of his stock), as will bear the same proportion to the whole amount of the deficit, as his stock, bears to the whole amount of the capital stock of the bank, at its par value. The inability of some of the stockholders to contribute to the assessment, will not increase the amount of his liability.

IN error to the Supreme Court of the District of Columbia. The opinion states the case.

SWAYNE, J. This case is a petition to the Supreme Court of the District of Columbia for a writ of *mandamus* directed to the Comptroller of the Currency. It was fully heard in that court upon the merits. The writ was refused and judgment was rendered against the relator for costs. This writ of error was thereupon sued out, and the case is thus brought before us for review. There

is no controversy as to the facts. The only question presented for our consideration is a question of law. The case made in the record, so far as it is necessary to be stated for the purposes of this opinion, is as follows:

On the 7th of April, 1874, the Crescent City National Bank of New Orleans was, and for some time had been, insolvent and in the hands of a receiver. On that day, the Comptroller assessed each shareholder, seventy per cent upon the par value of each share of his stock, and ordered the receiver to collect the assessment. This the receiver proceeded to do by filing a bill in equity in the Circuit Court of the United States for the District of Louisiana, against all the shareholders. Thereafter he obtained a decree against all the defendants severally, who were within the jurisdiction of the court, for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the Comptroller might deem it proper to make, and it is still pending.

The capital stock of the bank was $500,000; seventy per cent therefore was $350,000. This sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over. But by reason of the insolvency of many of the shareholders, the assessment netted only $112,658.13, and nothing or very little more will hereafter be realized from it. From the proceeds of the assessment and other assets of the bank, eighty per cent of the principal of its debts have been paid.

The relator, being a large creditor of the bank, requested the Comptroller to order a further assessment of thirty per cent upon each share of the capital stock, for the discharge of the balance of principal and interest still due to its creditors, and to direct the receiver to proceed as before to collect the amount of the new assessment. The Comptroller refused, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent. He holds that no such liability is imposed on the solvent shareholders, and that he has therefore no right or power to make the assessment as requested. The point to be decided is whether he is clothed with this power and duty, and whether the shareholders are thus liable.

The first bank law was passed February 25, 1863, chapter 58, 12 Stat. 668. The last clause of section 12 is as follows:

"For all debts contracted by such association for circulation, deposits or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares."

This provision was changed in 1864, and has been since, and is now in force in these terms:

"The shareholders of every National banking association shall be held individually responsible, *equally and ratably and not one for another*, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." R. S. (U. S.), § 5151.

The act of 1863 made no provision for enforcing the personal liability of shareholders, while that of 1864 provided that it might be done through a receiver appointed by the Comptroller and acting under his direction. Id., § 5234.

The difference between the clause creating the individual liability as it was originally, and as it was after it was amended and altered, is obvious and striking. The change was plainly made *ex industria*, to prevent the possibility of doubt as to the meaning of Congress. What the effect of the clause would have been without the change, is a point we are not called upon to consider. The charter of a private corporation is a contract between the law-making power and the corporators, and the rights and obligations of the latter are to be measured accordingly.

By the common law, the individual property of the stockholders was not liable for the debts of the corporation under any circumstances. Here the liability exists by virtue of the statute and the assent of the corporators to its provisions, given by the contract which they entered into with Congress in accepting the charter. With respect to the character of that liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay.

In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by *all the shareholders;* (2) the amount of the deficit to be paid after exhaust-

ing all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit, as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock.

The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any way affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease* v. *Babcock*, 10 Metc. 525.

These rules have been applied in several well-considered judgments of other courts, where the words we have italicised were not in the statutes upon which they proceeded. We have found no case in conflict with them. See *Crease* v. *Babcock*, *supra*; *Atwood* v. *R. I. Agricultural Bank*, 1 R. I. 376; *Matter of Hollister Bank*, 27 N. Y. 393; 84 Am. Dec. 292; *Adkins* v. *Thornton*, 19 Ga. 325; *Robinson* v. *Lane*, id. 337; *Wisewell* v. *Starr*, 48 Me. 401. See also Morse Banking, 503.

Although assessments made by the Comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made clearly and palpably contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.

Nothing in this opinion is intended in anywise to affect the authority of *Kennedy* v. *Gibson*, 8 Wall. 498; 1 Nat. Bank Cas. 17, and *Casey* v. *Galli*, 94 U. S. 673; 1 Nat. Bank Cas. 142. On the contrary, we approve and reaffirm the rule laid down in those cases.

The Comptroller decided correctly as to his duty in this case.

The judgment of the Supreme Court of the District of Columbia is therefore affirmed.

National Bank v. Whitney.

(103 U. S. 99.)

Mortgage — future advances.

No objection can be sustained against the validity of a mortgage taken by a National bank to secure future advances except by the government.*

A mortgage taken without notice of a prior unrecorded mortgage has priority of lien.

IN error to the Supreme Court of the State of New York. The case is fully stated by the court.

Theodore Bacon, for plaintiff in error.

W. Harris Day and *John Van Voorhis*, for defendants in error.

Field, J. It appears from the record that the defendant Whitney, some time previously to 1871, executed to Maria Crocker a mortgage upon certain real property situated in the county of Genesee, in the State of New York, to secure an indebtedness to her; that in a suit brought for that purpose, the mortgage was foreclosed and a decree entered for the sale of the premises; that such sale was had and the amount received satisfied the debt and left a surplus of over $3,800, which was paid into court. The present controversy is between subsequent mortgagees and judgment creditors for this surplus.

On the 12th of January, 1871, Whitney executed a mortgage upon the same premises to the National Bank of Genesee, providing in terms for the payment of $5,000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared from an examination of the accounts between the parties, that his indebtedness at the

* See Swope v. Leffingwell, 105 U. S. 3.

date of the mortgage was $3,200 and that this was paid before September 16, 1872.

On this last day, Whitney executed two other mortgages upon the same property, one to Homer Bostwick, and the other to Edward McCormick. The one to Bostwick was executed as security for the payment of liabilities and indebtedness which already had been or might thereafter be incurred by him on account of Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500. This mortgage was recorded at noon on the day of its execution. The amount of the liability subsequently incurred by Whitney to Bostwick exceeded the sum named. The mortgage to McCormick was executed as security for similar liabilities and indebtedness which might be incurred by him for Whitney, to an amount not exceeding $1,500, and was recorded at forty-five minutes past one of the day of its execution. The amount of liabilities incurred by McCormick for Whitney exceeded the sum named

It is unnecessary to give the particulars of other subsequent incumbrances, as under no circumstances could any of the surplus be applied to their discharge. In any view that can be taken of the mortgages mentioned, the surplus in controversy will be exhausted by them.

The principal question for our determination relates to the validity of the mortgage of Whitney to the National Bank, so far as it applies to future advances to him. His indebtedness existing at the execution of the mortgage has been satisfied. His indebtedness subsequently incurred, amounted at the sale of the premises to $5,160. If the mortgage for the future indebtedness can be sustained as a valid instrument for that purpose, the entire surplus will be absorbed for its payment, excepting such portion as may be first payable to McCormick by reason of the fact that he took his mortgage without notice of the one to the bank. It is contended that the mortgage to the bank, so far as it applies to future advances, is invalid, because a mortgage of that character is prohibited by the National Banking Law. That law, after in terms authorizing every National banking association to loan money on personal security declares, that it "may purchase, hold and convey real estate for the following purposes, and for no others: *First*,

such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it."

The question presented is not an open one in this court. It was determined in the case of *Nat. Bk.* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12, at the October term of 1878. It there appeared that Matthews and another person had given their joint note to a mercantile company for $15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterward the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at its maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, and obtained a decree for a perpetual injunction, upon the ground that the loan was made upon real security, which was forbidden by the statute. The Supreme Court of the State affirmed the decree, and the case was brought here, where the decree was reversed and the cause remanded, with directions to the court below to dismiss the bill.

In coming to this conclusion this court considered the transaction in two aspects: First, as not being within the letter of the statute, because the deed of trust was not executed to the bank; and second, as a loan upon real estate security.

Viewed in the first aspect, the court held that as a mortgage the deed of trust was merely an incident to the note, and a right to its benefit, whether it was delivered or not with the note, passed with the transfer of the latter. If the bank had made the loan upon the note alone, the benefit of the deed as a mortgage would have inured to it by operation of law. Of course that which the law would give independently of a direct transfer by the mortgagor, the statute did not intend to defeat because such transfer was made.

Viewing the second aspect, as a loan upon real estate security, the court observed that, so treating it, the consequence insisted

upon did not follow; that the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. And after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the government against them, the court held that the prohibitory clauses of the Banking Law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the government. "The impending danger," said the court, "of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The construction of the act of Congress thus given has been acted upon by the National banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court, for statutory regulations would operate only in the future.

The decision in the case cited, controls the present case, and in conformity with it, we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the

objection can only be urged by the government. *Fleckner* v. *Bank*, 8 Wheat. 338–355.

But it appears from the record that the mortgage to McCormick was taken by him without notice of the prior mortgage to the bank, which had not then been registered. He has therefore a right as against the bank to prior payment of the $1,500 and interest, for which amount his mortgage was a lien upon the premises.

Bostwick took his mortgage with notice of the one to the bank. He cannot therefore claim any of the surplus until the debt of the bank is paid. The surplus should therefore be first applied to McCormick's claim, and the balance to the claim of the bank.

It follows that the decree of the Supreme Court of New York must be reversed and the case remanded, with directions to enter a decree in conformity with this opinion.

So ordered.

German National Bank of Chicago v. Kimball.

(103 U. S. 732.)

Taxation — bank shares — injunction — offer.

A court of equity will not enjoin the collection of a local tax upon National bank shares on the ground that the assessment is partial, unequal and unjust, as compared with that upon other property, there being no offer to pay any tax, and the effect of an injunction being to declare the whole tax of a State for the year void.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois, by the complainant in an action by it against Mark Kimball, collector of the town of South Chicago, and Samuel H. McCrea, treasurer, etc., to enjoin the collection of a tax. The opinion states the case.

MILLER, J. This is a bill in chancery, filed by the appellant in the Circuit Court for the Northern District of Illinois, to enjoin the defendant, who was the State tax collector, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock.

mense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded." Page 612.

These principles are sufficient to decide the case, and were declared by this court in the case arising in the same State and under the same Constitution and revenue laws with the one now before us. The case seems to have escaped the attention of counsel on both sides, as no reference is made to it in the briefs, though they are very full.

In the recent case of *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57; and *Pelton* v. *National Bank*, 101 U. S. 143; 2 Nat. Bank Cas. 85; and *Cumming* v. *National Bank*, 101 U. S. 153; 2 Nat. Bank Cas. 74, an apparent exception to the universality of the rule is admitted. It is held in these cases that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject.

So far as any thing of the kind is to be inferred, it is that shares of National bank stock, including plaintiff's, were assessed at only thirty-four per cent of their value, which, by the board of equalization, was raised to fifty-three per cent; and other property more, and still other less.

The case, then, made by plaintiff is this: that the shares of the bank are taxed at the same per cent on their assessed value as all

other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of complainant's bank.

And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertained precisely to the last dollar what each share would have paid.

We think the Circuit Court did not err in dismissing such a bill, and its decree is affirmed.

JOHNSTON v. LAFLIN.*

(103 U. S. 800.)

Stock — purchase by bank of its own.

The owner of shares in a National bank, which he believed to be solvent, sold them to a broker for a consideration, executing a power of attorney in blank, authorizing their transfer on the books of the bank. The shares were purchased by the broker, but without knowledge of the owner, for the president of the bank. The latter caused the name of his clerk to be inserted as attorney, the clerk then transferring the shares to the president as trustee, on the bank's official stock register. The president purchased the stock for the bank and with its funds. The clerk knew of this fact, but neither the broker nor the owner knew it. *Held*, that the sale to the broker could not be impeached as in violation of the statute forbidding the purchase by a National bank of its own shares.

APPEAL by plaintiff from a decree of the Circuit Court of the United States for the Eastern District of Missouri, in an action by Walter S. Johnston, receiver of the National Bank of the State of Missouri, against Sylvester H. Laflin and James H. Britton. The facts appear in the opinion.

* Affirming 1 Nat. Bank Cas. 331.

FIELD, J. The questions raised in this case are important to owners of shares in the National banks, but they are not difficult of solution. The delay in their decision has been caused by the great pressure of business upon the court and not from any doubt as to their proper disposition. The appellant, the complainant below, is the receiver of the National Bank of the State of Missouri, appointed by the Comptroller of the Currency on the 27th of June, 1877. The bank failed on the 20th of that month. The defendant James H. Britton was its president and had been so for some years. On the 16th of May, 1877, and for some time previously, the defendant Laflin was a stockholder of the bank, owning eighty-five shares of full-paid stock. He was not a director of the bank, nor had he any personal knowledge of its actual financial condition. It is to be presumed that he regarded that condition as sound, for up to the time of the failure he continued to deposit funds with it for the company of which he was a resident director at St. Louis. On the day mentioned, May 16, 1877, he sold his eighty-five shares to a broker, to whom he delivered his certificate of the stock, with a blank power of attorney indorsed thereon, authorizing the attorney, whose name might be subsequently inserted by the broker, or any other party becoming the owner of the certificate, to transfer it on the books of the bank in such form and manner as might be necessary or required by its regulations. Laflin did not at the time know for whom the stock was bought; information on the subject was withheld from him. He received for the price agreed, the broker's check on a banking-house in St. Louis, which was paid the same day, on presentation. The broker was however in fact acting for Britton, the president of the bank, who represented that he was purchasing for himself or for a party whose name he did not disclose. There was no intimation that he was making the purchase for the bank or in its interest. He gave the broker his individual check on the bank for the price of the stock, which was paid on presentation. Subsequently, but on the same day, he received the certificate and thereupon directed a bookkeeper in the bank, named Geralt, to fill up the power of attorney with his, the bookkeeper's, name, and to transfer the certificate to his, Britton's, name as trustee, on the transfer book or stock register

of the bank, which was accordingly done. He had at the time, to his individual credit at the bank several hundred dollars more than sufficient to meet the check. He had for years dealt largely on his own account in its stock and there was nothing in the transaction between the broker and himself to awaken suspicion as to its legality or propriety. Some days afterward, on the 29th of the same month, at an election of directors, he represented and voted on the stock purchased.

It appears however that whilst the shares stood on the official stock register in the name of Britton, as trustee, without stating for whom he was trustee, the transaction was entered on the stock ledger in an account with him as "trustee of the bank." And by his directions the bookkeeper credited his individual account with the amount of the check given for the shares and charged the same amount to the "sundry stock account." In other words, the entries on the books — other than the official stock register — showed that the stock was purchased by Britton for the benefit of the bank and paid for with its funds. But neither Laflin nor the broker had any notice of the manner in which the transfer was made, or of the entries on the books of the bank, or that the purchase had been made with its funds. The bookkeeper, Geralt, who made the transfer and the entries, had however actual knowledge of the facts.

The present suit is brought by the receiver of the bank to set aside the purchase of the eighty-five shares, to compel Laflin to repay the money received and Britton to retransfer to him the shares on the books of the bank, and to have him declared to be still a stockholder in respect of those shares.

The statute declares that the capital stock of every National banking association shall be divided into shares of $100 each, and be transferable on its books in such manner as may be prescribed by its by-laws or articles, and that every person becoming a stockholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder. There was no by-law of the association here regulating transfers of its shares, but each certificate of stock contained this provision:

"Transferable only on the books of the said bank, in person or by attorney on the return of this certificate, and in conformity with the provisions of the laws of Congress and the by-laws which may be in force at the time of such transfer."

The statute also declares that no association shall be the purchaser of any shares of its own capital stock, unless the purchase be necessary to prevent a loss upon a debt previously contracted. The purchase by the bank, through its president, in the present case, was not made to prevent such a loss. Laflin was not indebted to the bank at the time he sold his shares. The receiver therefore, starting with the conceded fact that the purchase by the bank was prohibited, and therefore illegal on its part, seeks to charge Laflin with the consequences of such illegality, as though he had dealt directly with the bank, or had known at the time that the purchase was made for it. He assumes such knowledge by Laflin because the party with whose name the blank power of attorney was filled, to make the transfer of the certificate of stock, was cognizant of the facts. His argument is substantially this: The transfer of the stock is not complete until made on the books of the bank, and the attorney who made it, knew that the purchase was by the bank and with its funds, and his knowledge was the knowledge of Laflin.

The general doctrine that the principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent pending the proceeding, is not questioned. Had Geralt, the bookkeeper, been appointed by Laflin to make the sale, and had he in negotiating it learned the facts as to the purchase and use of the funds of the bank, there would be ground to invoke the application of the doctrine. But such was not the position of Geralt to Laflin. The sale was consummated, so far as Laflin was concerned, when he delivered the certificate, with the power to transfer it, to the broker. The latter did not mention the name of the principal for whom he was acting. He declined to give it. Laflin had a right therefore to treat him as the principal, and if he was competent to make the purchase the sale was valid. Shares in the capital stock of associations, under the National Banking Law, are saleable and transferable at the will of the owner. They are in that respect like other personal property. The statute recognizes this trans-

ferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect however can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the directors or other stockholders. It is not necessary however to consider what restrictions would be within its power, for it had imposed none. As between Laflin and the broker the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled at the instance of either of them. *Bank* v. *Lanier*, 11 Wall. 369; 1 Nat. Bank Cas. 70; *Webster* v. *Upton*, 91 U. S. 65; *Bank of Utica* v. *Smalley*, 2 Cow. 777; *Gilbert* v. *Manchester Iron Co.*, 11 Wend. 628; *Commercial Bank of Buffalo* v. *Kortright*, 22 id. 362; *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; 18 Am. Dec. 306.

The transferability of shares in the National banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transaction. A different doctrine would put a speedy end to the signing of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.

The further position of the receiver, that the assets of the bank constituted a trust fund for the benefit of its creditors, and where wrongfully diverted, can be followed in whosesoever hands they can be traced, may as the statement of a general doctrine, be admitted. But it has no application to the case at bar. Here no assets of the bank were received by Laflin. What he received came from the broker, the only person with whom he dealt or whom he knew as principal in the negotiation. The circumstance that the purchase was actually in the interest of the bank — though of that fact the broker was ignorant — cannot affect the latter's character as principal, so far as Laflin was concerned, which he bore in the negotiation.

The whole transaction, on the part of Laflin, was free from any imputation of fraud. He sold his shares to a person competent to purchase and hold them, and received the stipulated price. It would be a perversion of justice and of the ordinary rules governing men in commercial transactions, to hold the sale, under such circumstances, vitiated by the relations of the purchaser to others, of which the seller had no knowledge or any grounds to entertain a suspicion. The validity of the sale of stock cannot be made to

depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other.

Of course the whole case here would be changed if the sale by Laflin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.

Decree affirmed.

DRIESBACH v. SECOND NATIONAL BANK OF WILKESBARRE.

STARK v. SAME.

(104 U. S. 52.)

Usury.

Usurious interest actually paid to a National bank on renewal notes, may not be set off in an action on the notes.

ERROR to the United States Circuit Court for the Western District of Pennsylvania. Action on notes against maker and indorser.

James O. Parker, for plaintiff in error.

W. H. Armstrong, for defendant in error.

WAITE, C. J. The object of the plaintiffs in error in these suits was to have usurious interest paid a National bank on renewing a series of notes, of which those in suit were the last, applied in satisfaction of the principal of the debt. The claim was not for interest stipulated for and included in the notes sued on, but for the application of what had actually been paid as interest to the discharge of principal. This the court held in *Barnet* v.

National Bank, 98 U. S. 555, could not be done; and in *National Bank* v. *Gruber*, 87 Penn. St. 465; 2 Nat. Bank Cas. 395, and *National Bank* v. *Dushane*, 96 Penn. St. 340, *post*, the Supreme Court of Pennsylvania followed that case, overruling its former decisions on the same question in *Lucas* v. *Bank*, 78 Penn. St. 228; 1 Nat. Bank Cas. 872, and *Overholt* v. *Bank*, 82 Penn. St. 490; 1 Nat. Bank Cas. 883. The court therefore refused to reverse the judgments for specific errors complained of, as it would serve no useful purpose, for on the facts admitted, the same general result must follow another trial.

Without therefore considering at all the question on which the cases seem to have turned below, the

Judgments are affirmed.

CENTRAL NATIONAL BANK OF BALTIMORE v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(104 U. S. 54.)

Dissolution.

A National bank in voluntary liquidation, may still sue and be sued by its name for the purpose of closing its business, and a creditor may maintain a suit upon a disputed claim although he has filed a bill under the act of June 30, 1876, section 2, to enforce the individual liability of shareholders.

APPEAL from the United States Circuit Court for the District of Maryland.

Arthur W. Machen, *George H. Williams* and *James O'Conner*, for appellant.

John Carson, for appellee.

MATTHEWS, J. [Omitting a lengthy consideration of questions in no way pertaining to National banks.]

1. It is claimed that the suit while in the Circuit Court, abated by reason of the dissolution of the defendant below as a corporate body.

The Central National Bank was organized under the National Bank Act of 1864 (13 Stat. at L. 99), and its amendments on January 16, 1871. Its articles of association provided that "This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act."

On July 15, 1874, three days before the complainant's bill was filed, at a meeting of the stockholders of the bank held pursuant to law, "It was voted by the stockholders of said association owning more than two-thirds of its stock, that said association go into liquidation and be closed."

It is certified by the Comptroller of the Currency "That the Central National Bank of Baltimore went into voluntary liquidation on July 15, 1874, under sections 5220 and 5221 of the Revised Statutes of the United States, and on January 8, 1875, deposited legal tender notes with the Treasurer of the United States for the full amount of its outstanding circulation, as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department."

It further appears, that the bank ceased to do any new banking business after resolving to go into liquidation; paid its depositors and other creditors, so far as their claims were admitted; reduced its assets to cash, and distributed the money among the shareholders, paying them back their capital in full with an accumulation of two per cent premium. The bank's lease of its banking-house expired March 1, 1875, when its doors were closed, its clerks discharged and afterward its furniture removed and disposed of and its signs taken down. On February 1, 1875, a special authority was issued by the board of directors, authorizing the president and acting cashier to act for and do all legal acts that might become necessary in the liquidation of the business of the bank.

It is claimed that these facts show a dissolution of the corporation.

It is provided by section 5136, Rev. Stat., U. S., that every National bank, duly incorporated, shall "have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law."

By section 5220 it is also provided that "any association may go into liquidation and be closed, by the vote of its shareholders owning two-thirds of its stock."

Section 5221 requires that whenever a vote is taken to go into liquidation, notice of the fact shall be given to the Comptroller of the Currency, and publication made in newspapers, that the association is closing up its affairs and notifying its creditors to present their claims for payment.

Six months thereafter is given by section 5222, in which the association is required to deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation.

It is further provided (section 5224), that when that deposit has been made, the bonds deposited to secure payment of its notes shall be reassigned to it. "And thereafter the association and its shareholders shall stand discharged from all liabilities upon its circulating notes, and their notes shall be redeemed at the treasury of the United States."

In connection with the provision of the articles of association of the Central National Bank, already noticed, these are all the provisions of law that are supposed to affect the question.

It is to be observed that the sections under which the proceedings took place which, it is claimed, put an end to the corporate existence of the bank, do not refer in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs and, in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of the circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of

the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for, is to pay the debts of the corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made, which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common-law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business.

In the case of *Bk. of Bethel* v. *Pahquioque Bk.*, 14 Wall. 383; 1 Nat. Bank Cas. 77, the same question was made in reference to a National bank which, having become insolvent, by a refusal to pay its circulating notes, was put into liquidation by the Comptroller of the Currency, by the appointment of a receiver under other provisions of the Bank Act. It was there claimed, for the purpose of defeating a suit brought against the bank by name, that the appointment of the receiver, who had refused to admit and pay the plaintiff's claim, was a dissolution of the corporation. Mr. Justice CLIFFORD, delivering the opinion of the court, recited the provisions of the law upon the subject, and said: "None of these proceedings however support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives."

"Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly, if not en-

tirely, upon the construction of the act of Congress, and suffice it to say, that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs, under the provisions of the act which authorized its formation."

In that case it was argued, as in this, that as the only constitutional warrant for the existence of a National bank was its connection with the government as a fiscal agent, the severance of that connection *ipso facto* deprived it of vitality. The same argument would render it incapable of returning to its stockholders their capital and accumulated profits. If it was a reasonable incident to its living that it should contract debt, it is equally a reasonable incident to its dissolution that it should pay them. We see no constitutional impediment that prevents it.

The same conclusion was reached by the Court of Appeals of Maryland in the case of *Ordway* v. *Bank*, 47 Md. 217; 1 Nat. Bank Cas. 559. 28 Am. Rep. 455.

On June 30, 1876, Congress passed an act, authorizing the appointment of receivers of National banks, and for other purposes (19 Stat. at L. 63) the second section of which provides that when any National banking association shall have gone into liquidation under the provisions of section 5220 of the Revised Statutes, the individual liability of the stockholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

After the passage of this act, on January 8, 1878, it appears that the appellee filed in the Circuit Court of the United States for the District of Maryland its bill of complaint against the appellant, and against the persons who were shareholders in the bank at the time it resolved to go into liquidation, under the provisions of this section.

It is urged that this statute is itself evidence that the bank was dissolved as a corporation by the proceedings in liquidation, and that the pendency of the bill authorized by it was a bar to any further proceeding in the present suit.

We see nothing in the act of 1876 inconsistent with the continued existence of the bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have in the meantime been otherwise applied or shown to have been insufficient. It is a cumulative remedy and against other persons, and cannot be considered as an objection to the rendition of the present decree.

Decree affirmed.

National Bank of Gloversville v. Johnson.*

(104 U. S. 271.)

Usury — action to recover — conflict of laws.

One who procures the discount by a National bank of promissory notes of others, held by him, he indorsing the same, at an unlawful rate of interest, may maintain an action to recover back from the bank twice the amount of such interest, under the provisions of the United States Revised Statutes, section 5198, giving the right to such an action, and this notwithstanding the transaction would not, under the law of the State where the bank is located, be usurious if between private persons.

IN error to the Supreme Court of the State of New York. The action was brought by James H. Johnson to recover penalties for the taking of excessive interest. The opinion states the case.

MATTHEWS, J. The original action was brought in the Supreme Court of the State of New York by the defendant in error to recover of the plaintiff in error, a National bank, penalties alleged to have been incurred by it under sections 5197 and 5198 of the

*Affirming, Johnson v. National Bank of Gloversville, 2 Nat. Bank Cas. 302.

Revised Statutes of the United States. These sections are as follows:

"SEC. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight-drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"SEC. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any Circuit, District or Territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

The facts as stated in the record are undisputed. The defendant below, a National banking association, doing business at Gloversville, in the State of New York, from November 10, 1874, to February 7, 1876, discounted for the plaintiff commercial paper and promissory notes amounting to $158,003. All such discounts were made at a uniform rate of interest, being twelve per cent per annum. The whole amount of interest paid thereon by the plaintiff below was $6,564.88, being an excess beyond the rate allowed by the general laws of the State of $2,735.36. This interest was knowingly charged and received by the bank. The most of the paper discounted was business paper, that is, negotiable promissory notes, held and owned by the plaintiff below, and on

which he could have maintained actions against the prior parties. A small portion was accommodation paper, but not known by the bank to be such, and there was nothing upon its face to indicate that to be its character. All the paper discounted was paid to the bank at maturity or before the present action was brought. At the times when the notes were discounted they were indorsed by the plaintiff below, and the proceeds of the notes discounted were entered to his credit in his bank account.

Upon these facts judgment was rendered against the defendant below for $5,470.72, twice the amount of the interest in excess of seven per cent per annum, to reverse which this writ of error is prosecuted.

It is contended on behalf of the plaintiff in error that the sections of the Revised Statutes in question were intended only to prevent National banks from violating the usury laws of the State in which they were severally organized and established; and that while by the law of New York it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent per annum, yet it is not usurious or illegal in that State for natural persons to acquire business paper, that is, paper valid in the hands of the holder, so that he might maintain an action thereon against the prior parties, at any rate of discount agreed upon between the parties to the negotiation, without limit in excess of seven per cent per annum.

It is assigned for error that the Court of Appeals negatived this proposition.

The rate of interest upon the loan or forbearance of money, established and in force by the laws of New York, is seven per cent per annum. Part II, chap. 4, tit. III, 3 R. S. (N. Y.) 72, § 1.

By section 5 of the same act it is provided that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatever (except bottomry and respondentia bonds and contracts), etc., whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of money, etc., than is above prescribed, shall be void.

It is and long has been the law in New York, as decided in

Cram v. *Hendricks*, 7 Wend. 569, that "the transfer by the payee of a valid available note, upon which when due he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not a usurious transaction, although the payee on such transfer indorses the note; and on non-payment by the maker, the indorsee may maintain an action against the indorser; but the sum which the indorsee in such case is entitled to recover of the indorser is the amount of the advance made by him, together with the interest thereon at the legal rate; while in an action against the maker, the indorsee is entitled to the whole amount of the note."

This proceeds upon the idea that the original note is founded upon a valid consideration, free from usury in its inception; and that the indorsement and delivery contain two contracts; one executed, which transferred the title, as upon a sale, as if indorsed without recourse; the other executory, upon which the indorser is liable to the indorsee, to pay upon the default of the maker, after demand and due notice thereof; although in the latter case it will be observed the recovery is limited by the New York decisions to the actual consideration paid, with lawful interest thereon.

The transaction is treated as a sale of the note, and no limits are fixed by law upon the price of the article sold; but so far as the liability of the vendor is concerned, in order to avoid the consequences of treating the advance money, which constituted the consideration, as a loan, it is limited to a return thereof, with lawful interest.

The question we have now to determine is whether, in transactions of this description, in which a National banking association is the transferee, the same view can be taken of the relations and rights of the parties, in the present case the Court of Appeals having decided that the same rule does not apply. 74 N. Y. 329.

The very point had been previously raised and decided by that court in *Nash* v. *White's Bank of Buffalo*, 68 N. Y. 396, which was an action to recover penalties under the State law of 1870, in reference to banking institutions, for discounting paper at a greater rate of interest than seven per cent per annum. The provisions of that act, being chapter 163, Laws of New York of 1870,

correspond almost exactly with those of sections 5197, 5198 of Revised Statutes of the United States, now under consideration, it being the declared intent of the statute to place the banking associations of the State on an equality, in the particulars specified, with National banks under the sections referred to. It was held that the fact that the paper discounted was business paper, purchased by the defendant, did not constitute a defense, for the question was not whether it was an illegal transaction under the general statutes against usury, but whether it was within the terms of the prohibition, which forbade banks from charging on any discount a rate greater than seven per cent per annum.

And in *Atlantic State Bank of Brooklyn* v. *Savery*, 82 N. Y. 291, it was decided that the purchase of a promissory note for a sum less than its face, is a discount thereof within the meaning of the provision of the Banking Act of that State (§ 18, chap. 260, Laws of 1838), which authorizes associations organized under it to discount bills and notes. And in support of that definition of the terms, the court cites the authority of MacLeod on Banking, 43, where the author says: "The difference between the price of the debt and the amount of the debt is called discount," and "to buy or purchase a debt is always in commerce termed to discount it."

In *Fleckner* v. *Bank of United States*, 8 Wheat. 350, Mr. Justice STORY said: "Nothing can be clearer than that by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank," and added, that if the transaction could properly be called a sale, "it is a purchase by way of discount."

Discount, as we have seen, is the difference between the price and the amount of the debt, the evidence of which is transferred, and that difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance therefore upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money.

The specific power given to National banks (R. S., § 5, p. 136), is "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt." So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms "loans" and "discounts" are synonyms. It was so said in *Talmadge* v. *Pell*, 7 N. Y. 328; and in *Niagara County Bank* v. *Baker*, 15 Ohio St. 68, the very point decided was that "to discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance."

But whether loans and discounts are identical, in the sense of section 5197, or not, is quite immaterial, for both are expressly made subject to the same rate of interest. And unquestionably the transfer of the notes, which forms the basis of this controversy, if not a loan was a discount.

The contention of the plaintiff in error, that under this section whatever by the law of the State is lawful to natural persons in acquiring title to negotiable paper by discount is lawful for National banks, cannot be sustained, and derives no countenance, as is argued, from the decision in *Tiffany* v. *National Bank*, 18 Wall. 409; 1 Nat. Bank Cas. 90. All that was said in that case related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a State in which a National bank was located one rate of interest was lawful for natural persons and a different one to State banks, the National bank was authorized to charge on its loans the higher of the two. The sole particular in which National banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them. It is not intimated or implied that if in any State a natural person may discount paper, without regard to any rate of interest fixed by law, the same privilege is given to National banks. The privilege only extends to charging some rate of interest allowed to natural persons, which is fixed by the State law.

If it be said that the rate is allowed by the law of the State,

when it permits the parties to reserve and receive whatever they may agree upon, then the section furnishes the conclusive answer that "when no rate is fixed by the laws of the State, etc., the bank may take, receive, reserve or charge a rate not exceeding seven *per centum*." So that the transaction in question, in either aspect, is within the prohibition of the statute, and subjects the bank to the penalties sued for.

The conclusion is confirmed by the provision which declares that "the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." Here the purchase, discount and sale of bills of exchange are classed as one, and subject to the same rule and rate of interest. In section 5198, the forbidden transaction for which the penalties are prescribed, is spoken of as usurious; but this reference is to the prohibitions of the preceding section, and not to the laws of the State.

In the present case the paper was transferred by an indorsement, imposing the ordinary liability upon the indorser. It may perhaps be distinguished from cases where the title to the paper is transferred by an indorsement without recourse, or by mere delivery. The advance in such cases, to the previous holder, of the agreed consideration, can hardly be considered a loan, for the relation of debtor and creditor as between them is not created by the transaction, if made, as supposed, in good faith and not as a cover for usury. Whether it be a discount, within the meaning of the sections we have considered, and therefore subject to the same rule as to the rate of interest at which it may be discounted, which we have decided to be applicable to the transaction described in the present case; and if not, but is to be treated as a purchase of the paper, lawful at any proportion which the price paid bears to the amount ultimately payable by the parties to it, whether in that case National banks are authorized by the law of their organization to acquire title to it in that way, are questions which do not arise in this case, and upon which we express no opinion.

We find no error in the judgment, and it is accordingly affirmed.

Judgment affirmed.

ROSENBLATT v. JOHNSTON.

(104 U. S. 462.)

Taxation — exemption — assets in receiver's hands.

The personal assets and personal property of an insolvent National bank in the hands of a receiver appointed by the Comptroller of the Currency, in accordance with the provision of section 5234 of the United States Revised Statutes, are exempt from taxation under State laws.

APPEAL from Circuit Court, Eastern District of Missouri.

Leverett Bell, for appellant.

J. M. Krum & C. H. Krum, for appellee.

WAITE, C. J. The single question in this case is, whether the personal assets and personal property of an insolvent National bank in the hands of a receiver appointed by the Comptroller of the Currency in accordance with the provision of section 5234 of the Revised Statutes are exempt from taxation under State laws; and we have no hesitation in saying that in our opinion they are.

Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed. *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 398; 1 Nat. Bank Cas. 77; *Kennedy* v. *Gibson*, 8 Wall. 506; 1 Nat. Bank Cas. 17; *Bank* v. *Kennedy*, 17 Wall. 21; 1 Nat. Bank Cas. 77. If the shares have any value they are taxable in the hands of the holders or owners under section 5219 of the United States Revised Statutes, but the property held by the receiver, is exempt to the same extent it was before his appointment.

The decree of the Circuit Court is affirmed.

Decree affirmed.

SUPERVISORS OF ALBANY v. STANLEY.

(105 U. S. 305.)

Taxation by State — constitutionality.

In a statute which contains invalid or unconstitutional provisions, capable of separation from the valid, only the former are to be disregarded.

A statute of New York in relation to taxation required the assessors to assess to each tax payer his real estate at its value and his personal estate at its full value after deducting debts owed by him. It further provided that if before the assessments are completed he shall make affidavit, "that the value of the personal estate owned by him after deducting his just debts, and his property invested in the stock of any corporation liable to be taxed therefor, does not exceed a certain sum to be specified in the affidavit, it shall be the duty of" the assessors to value such personal estate at the sum specified in such affidavit and no more. Another statute provided that shareholders in National and other banks should be assessed on the value of their shares, but a deduction of their indebtedness was not allowed. The Federal statute permits shares in National banks to be taxed by a State only at the same rate as other money capital of the citizens of the State.

Held, that the statute in relation to taxing shares of National banks was a valid rule of assessment for the shareholders of such banks having no debts to deduct, not being in conflict with the Federal statute in respect to such shareholders.

Held also, that in the absence of the affidavit above provided for, assessors had authority to assess a shareholder in a National bank the full value of his shares.

IN error to the Circuit Court of the United States for the Northern District of New York.

MILLER, J. This is a writ of error to the Circuit Court for the Northern District of New York, in which Stanley, the defendant in error, recovered a judgment against plaintiffs in error for taxes exacted and paid under legal process on shares of the stock of the National Albany Exchange Bank. A large number of the shareholders of the bank who had paid this tax made an assignment of their claims to Stanley, and he recovered a judgment in the action for the sum of $61,991.20, with interest and costs.

The ground of this recovery was that the statute of New York, under which the shares of the bank were assessed, was void, because it did not permit the shareholder to make deduction of the

amount of his debts from the valuation of the shares of the stock owned by him, in ascertaining the amount for which the shares should be taxed.

The pleadings in the case set out the sums paid by the stockholders and their names, and their assignment to Stanley, the payment under compulsion of legal process, and a demand for the repayment on the Albany county authorities.

The case was submitted to the court on a waiver of trial by jury, and on the finding of facts and conclusions of law thereon by the court, judgment was rendered for plaintiffs. The facts found by the court are thus stated:

"*First.* That the allegations of the complaint in regard to the citizenship of the plaintiff, the citizenship and powers and liabilities of the defendant, the organization and capital of the National Albany Exchange Bank, the ownership of the shares of capital stock of the National Albany Exchange Bank, the assessment of the stockholders in said bank, named in said complaint, by the board of assessors of the city of Albany, the names and residences of said stockholders, the collection of taxes from said stockholders and the payment of the same to the county treasurer of the county of Albany, and the demand made by Chauncey P. Williams, before the commencement of this action, of the treasurer of the county of Albany, are true as therein set forth.

"*Second.* That the amounts collected from the said stockholders and paid to the treasurer of the county of Albany, and the times when the said amounts were so paid to said treasurer, were as follows, to-wit:

$907	90 paid	Aug. 11, 1874
127	84 paid	Aug. 11, 1874
1,868	06 paid	May 1, 1875
1,409	83 paid	May 27, 1876
1,202	32 paid	May 3, 1877
1,336	60 paid	April 17, 1878
1,473	02 paid	April 22, 1879
11,604	75 paid	May 1, 1875
8,147	26 paid	May 27, 1876
7,822	34 paid	May 3, 1877
7,357	94 paid	April 16, 1878
6,243	20 paid	April 21, 1879

"*Third.* That the sums above named were not paid voluntarily by said stockholders, but were forcibly collected by the marshal of the city of Albany, under a warrant issued to such marshal by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the board of supervisors of the county of Albany, by levying upon the property of the said stockholders respectively, as alleged in said complaint.

"*Fourth.* That the said assessments were made and said amounts collected and received by the treasurer of the county of Albany, as above stated, under

color of an act of the Legislature of the State of New York, entitled 'An act authorizing the taxation of stockholders of banks, and surplus funds of savings banks,' passed April 23, 1866, being chapter 761 of the Laws of 1866, and not otherwise.

"*Fifth.* That the allegations of the complaint with reference to the assignments by the respective stockholders of said bank of their claims against the county of Albany, by reason of the matters alleged in the said complaint, are true as set forth in said complaint, and that the plaintiff, at the time of the commencement of this action, was the holder and owner of all claims against the county of Albany, or against the defendant, arising out of the matters alleged and set forth in said complaint.

"*Sixth.* That the said act of the Legislature of the State of New York, chapter 761 of the Laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations, in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint, permitted and required by the laws of the State of New York to be made from the value of every kind of personal property and moneyed capital, other than bank stock, in assessing the same for the purpose of taxation.

"*Seventh.* That the allegations in the fourth count of said complaint, as to the presentation to the said board of assessors by said Chauncey P. Williams of the affidavit of his indebtedness, and the request by him for a reduction of his assessment on his bank stock, and the refusal of said board of assessors to make such reduction, and the application by said Williams to the Supreme Court of the State of New York for a writ of mandamus, and the subsequent legal proceedings thereon, including the decision of the Supreme Court of the United States, are true, as set forth in said fourth count."

It does not appear by this finding of the court that any shareholder, for whose payment of taxes this suit is brought, made affidavit or other application in regard to his indebtedness, that it might be deducted from his assessment, nor that any of these shareholders owed any thing to be deducted from the assessed value of the shares held by them, except the seventh finding of facts in regard to C. P. Williams.

Unless, therefore, the other shareholders who paid the tax on the shares of their stock were entitled to recover back the sum paid without any evidence that they had made affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to assessment of bank shares as to other personal property, and without any evidence that they owed any thing whatever to be deducted from any assessment of their personal property, including bank shares, the judgment in this cannot be supported.

The judge who decided the case on the Circuit found as a conclusion of law that the assessment of all shares of National banks was void, because the statute of New York, under which the assessments were necessarily made, was void, as being in conflict with the act of Congress on that subject, and he declares, in an opinion delivered in the case of *National Albany Exchange Bank* v. *Hills, Receiver of Taxes*,* in a chancery suit, that the assessments in this class of cases are absolutely void, the assessors having acted without any jurisdiction.

If this view of the subject be sound — if the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or if there was no law by which in any case they could assess and collect tax on shares of National banks — then it is of no consequence to inquire of any thing beyond the fact that plaintiff's assignors did pay such a tax under legal compulsion.

On the other hand, if the law is for any purpose a valid law, and if it can be held to furnish the rule of taxation as to any class of owners of National bank shares, then the onus is on plaintiff to show that his assignors are not of that class.

The question here to be decided arises under two statutes of the State of New York in regard to taxation.

The first of these is the act of 1850, relating to the assessment and collection of taxes in the city of Albany. The sixth section of the act requires the board of assessors to prepare an assessment-roll, in which there shall be set opposite the name of each tax payer (1) all his real estate liable to taxation and its value; (2) the full value of all his personal property after deducting the just debts owing by him.

Section 9 of the act is as follows:

"If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

* 2 Nat. Bank Cas. *456; reversed, *post* 45.

In 1866 the State enacted a law concerning the taxation of bank shares which was evidently intended to meet the requirements of the act of Congress in relation to State taxation of the shares of National banks, and the provision of this statute related only to taxing stockholders in banks, and to the capital invested in individual banks. The first section of this act reads as follows, and it contained no other provision for deductions as the basis of taxation, except what is found in this section:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in said place, town or ward or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

In the case of *People* v. *Dolan*, 36 N. Y. 59, the question was whether, taking these two statutes together, an owner of shares of stock in a National bank was entitled to deduct from the assessed value of his shares the just debts owing by him. It was argued that into this act of 1866 for the taxation of bank shares there should enter, as part of it, the provision of the act of 1850 which allowed this deduction as to all personal property, and that nothing in the act of 1866 forbade this or was inconsistent with it. It was also insisted that unless the act of 1866 was so construed it would violate the act of Congress which only permitted the shares of National banks to be taxed at the same rate as other money capital of the citizens of the State.

But the Court of Appeals overruled both propositions, and held that the true meaning of the act of 1866 was that no such deduc-

tion should be made, and that as thus construed it was not in conflict with the act of Congress on that subject.

In the subsequent case of *People, ex rel. Williams*, v. *Weaver*, Williams, who was a shareholder in the National Albany Exchange Bank, made the affidavit required by section 9 of the act of 1850, and presenting it to the board of assessors of the county, demanded a reduction in accordance with it from the valuation of his bank shares. On the refusal of the assessors to comply with this request, a proceeding was commenced in the courts of the State in which the Court of Appeals reaffirmed the principles of the case of *People* v. *Dolan*. That case coming into this court by writ of error, it was here held that while we were bound to accept the decision of the highest court of the State in construction of its own statute, the act of 1866 as thus construed was in that particular in conflict with the act of Congress, because it did tax shares of the National banks at a higher rate than other moneyed capital in the State. In that case, reported in 100 U. S. 539; 21 Alb. L. J. 210; 2 Nat. Bank Cas. 57, there are no words which declare the act of 1866 to be void, but the careful language of the decision is that "in refusing to plaintiff the same deduction for debts due by him from his shares of National bank stock that it allows to others who have moneyed capital otherwise invested, it is in conflict with the act of Congress."

Accepting therefore as we must the act of 1866 as construed by the Court of Appeals of New York, as not authorizing any deduction for debts by a shareholder of a National bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the State, or as to private bankers of which there no doubt exists a large number of both classes.

What is there to render it void as to a shareholder in a National bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why

should he invoke the protection of the act of Congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest, and which, if decided either way, affect no right of theirs?

It would seem that if the act remains a valid rule of assessment for shares of State banks and for individual bankers, it should also remain the rule for shareholders of National banks who have no debts to deduct, and who could not therefore deduct any thing if the statute conformed to the requirements of the act of Congress.

It is very difficult to conceive why the act of the Legislature should be held void any further than when it affects some right conferred by the act of Congress. If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.

The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation only the latter are to be disregarded.

In the case of *Railroad Companies* v. *Schutte*, 103 U. S. 118, decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. "It is contended," said the court, "that as the provision of the act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law." And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company, in order that the company might get the benefit of the better credit of the State, was accompanied by a mortgage created alone by the statute in favor of the State as her security, and the court while holding that the exchange of bonds was void as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of

the company and which was only a mortgage by operation of the same statute, was valid.

The language of this court in the two cases cited in the brief of *United States* v. *Reese*, 92 U. S. 214, and *Trade Mark Cases*, 100 id. 82, concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. Said the court in the latter case: "While it may be true that when one part of the statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each may stand alone; it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear. * * * " The case of *United States* v. *Reese*, also implies that there may be unconstitutional provisions which do not vitiate the whole statute or even a single section, because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that in both these cases it was a statute creating and punishing offenses criminally which was to be construed in regard to the limited constitutional power of Congress in criminal matters.

The case of *State Freight Tax*, 15 Wall. 432, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company and canal company doing business within the State. The railroad company, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. This court held the latter to be void as a tax on inter-State commerce, and did not declare the whole tax or the whole statute void. It said: "It is not the purpose of the law but its effect which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-State commerce. * * * The conclusion of the whole matter is that in our opinion, the act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the State or articles taken up

in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void." The same language is repeated in *Erie R. Co.* v. *Pennsylvania*, decided at the same time, and both cases were remanded to the State court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State and not on inter-State commerce.

This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.

But in a review of the cases in this court on this subject, that of *Austin* v. *Aldermen of Boston* will be found most nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State taxing shares' of the National banks as being in conflict with the act of Congress. That act said that such taxes might be assessed at the place where said bank was located and not elsewhere.

The act of the Massachusetts Legislature directed the assessment and taxation of the shares at the place where the owner resided. The plaintiff in error, Austin, having contested the tax on his shares in the courts of the State unsuccessfully, brought the case here by writ of error. This court declined to enter upon the question of the validity of the Massachusetts statute, because the case did not show that Mr. Austin was taxed on his shares in any other place than Boston, the place where the bank was located.

The argument of counsel in the case before us is that any tax or a tax on any person on account of his bank shares is void because the whole of the New York statute is void. If the argument is sound it was equally applicable to Austin's case.

The statute of Massachusetts, which made no limitation of taxation to the place where the bank was located, must be held void under any principle which would wholly invalidate the statute of New York, because it did not allow the deduction of the owner's indebtedness from his shares. And if the Massachusetts statute was utterly void as to National bank shares, then the tax on Mr. Austin's shares in Boston was void and he had a right to be protected against the unconstitutional statute. The court evidently

went upon the principle that the statute was only void as against the act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point.

To the same effect are the cases of *People* v. *Bull*, 46 N. Y. 46; *Gordon* v. *Carnes*, 47 id. 608; *Village of Middleton, Ex parte*, 81 id. 196.

If we examine the statute before us on principle we shall find but little reason to hold it to be wholly void as regards bank shares. If the statute stood alone there is nothing in it in conflict with the act of Congress. It is only when we look to the other statute, which prevents the deduction of debts from the entire value of personal property, that we discern the discrimination against bank shares. The act declares that bank shares shall be taxed according to their value, after deducting the real estate and other property on which the bank itself pays tax. This is eminently just. It provides for a mode of ascertaining their value, the officers who shall do it, and how the tax shall be collected. In all this the law is valid except that it does not authorize a deduction for debts of the shareholder. This is a distinct and separable principle. When the shareholder has no debts to deduct the law provides a mode of assessment for him which is not in conflict with the act of Congress, and the law in that case can be held valid. Under the decision in *Austin* v. *Aldermen of Boston*, it is valid as to him.

If he has debts to be deducted the case of *Williams* v. *Weaver* shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the remainder of the law remains valid. In other words, in such a case so much of the law as conflicts with the act of Congress in the given case is held invalid, and that part of the State law which is in accord with the act of Congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is therefore no necessity of holding the statute void as to all taxation of National bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts.

It follows that the assessors were not without authority to assess National bank shares; that where no debts of the owners existed to be deducted the assessment was valid, and the tax paid under it a valid tax. That in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted.

If they then proceeded in disregard of the act of Congress the assessment was erroneous, and the case of *Williams* v. *Weaver* shows how that error could be corrected.

The case before us shows no error in any case but that of Mr. Williams, and in that case he has obtained the judicial decision of this court that the tax he paid was illegally exacted from him. Nor do the facts of his case raise the question whether in a case where the debts of the shareholder do not equal the assessors' value of his shares the tax is wholly erroneous, or only so much as represent the assessment of his indebtedness that should have been deducted, for his affidavit was that his debts equalled the value of his bank shares. Nor do the findings of fact raise the question whether, without making affidavit and demand on the assessors, a suit can be maintained to recover when such indebtedness actually existed; for he did make affidavit and demand, and no other tax payer has shown any such notice or demand, or that he had any indebtedness to be deducted. There is neither finding of fact nor averment in the pleadings on either point as to any other assignors of plaintiff than Mr. Williams. It results from these considerations that the judgment of the Circuit Court is reversed, and that on the finding of facts judgment should be rendered for plaintiff on the fourth count for the amount of the tax paid by Williams with interest, and on all the other counts for defendants.

*It is so ordered.**

BRADLEY, J., *dissenting.* I dissent from the judgment of the court in all these cases for the reason, that in my opinion, the State

*On the 24th of April a decision was made in which the judgment was modified so as to permit the court below to hear evidence in respect to another issue raised by the pleadings but not passed upon, namely: Whether the assessment of shares in the National bank was at a greater rate than that upon other moneyed capital.

laws authorizing the capital stock of National banks to be taxed without allowing any deduction for the debts of the stockholders where such deduction is allowed in relation to other moneyed capital, are void *in toto* so far as relates to National banks. To hold the law valid except as to those who are actually indebted and actually claim the benefit of the deduction, and actually set it up in a suit brought by the bank for relief, is practically to render the condition of the act of Congress nugatory, and to deprive the National banks and their stockholders of its protection. The tax though laid on the stockholders is required to be paid by the bank itself, which must pay without deduction unless the shareholders give the bank notice of the amount of their debts. This is a most ingenious expedient to avoid such deductions altogether. The probability that not one in ten of the shareholders will ever have notice of the assessment in time to make the claim, and the natural reluctance they would have (if they had notice) to lay the amount of their debts before a board of bank officers will effectually secure a State from claims for deduction. And that was no doubt the object of the law. But this unequal operation of it, in its practical effect, might not be sufficient to render it void. It is void, in my judgment, because it makes no exception, but is general in its terms, subjecting to taxation the capital stock of National banks without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots. It is not like the case where a portion of a law which may be separated from the rest can be declared invalid without affecting the remainder of the law; nor like the case of a general law which the Legislature has power to make, but from the operation of which some individuals may have a legal or constitutional exemption which they can plead in their defense; but it is wrong in form, wrong *in toto*. The Legislature had no authority or power to make the capital of National banks taxable except in the same manner as other moneyed capital of the State. The practical iniquity of the law is seen in this, that it affects the value of all the stock, whoever holds it. As the law stands it acts as a prohibition against the purchase of the stock by those who owe debts, and they constitute a considerable portion of

every community. It does not help the validity of the law for us to declare that it is *pro tanto* void, and in fact make a new law for the State. Its validity must be decided by its actual form and terms. If these cannot stand the law is void.

Hills v. National Albany Exchange Bank.*

(105 U. S. 319.)

Jurisdiction — suit to restrain tax. Taxation — injunction — deductions.

In an action by a National bank against the State tax officers, in behalf of its shareholders, to enjoin the collection of a State tax on the shares of the bank alleged to be unlawful on the ground that indebtedness was not deducted, *held* (1), that such a suit was maintainable; (2) that an injunction would lie in behalf of a shareholder who was entitled to a deduction and who had made the affidavit and demand therefor required by the State law; and (3) it being clearly shown that an affidavit and demand would have been unavailing, that shareholders might be permitted to show in the action the deductions to which they were entitled and the collection of the amount of such deductions would be enjoined.

APPEAL from the Circuit Court of the United States for the Northern District of New York. The opinion states the case.

Miller, J. This is an appeal from a decree in chancery of the Circuit Court for the Northern District of New York, and it presents very much the same questions that have just been decided in the case of *Supervisors of Albany County* v. *Edward Stanley*. That was a common-law action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank, and the present suit was brought to enjoin the appellants from collecting a similar tax assessed and yet unpaid for that year. In this case the bank sued in right of and as representing all the stockholders, and the Circuit Court made a decree perpetually enjoining the collection of all taxes on shares of said bank. Several questions are raised or rather sug-

* Reversing 2 Nat. Bank Cas. 456.*

gested which we think have heretofore been decided by this court, such as the right of the bank to maintain a suit on behalf of its shareholders. This was established by the cases of *Cumming* v. *National Bank*, 101 U. S. 153; 2 Nat. Bank Cas. 74; *Pelton* v. *National Bank*, 101 U. S. 143; 2 Nat. Bank Cas. 85. There is also an attempt to show that there was a settled rule or purpose on the part of the assessors to value the shares of the appellee bank higher in proportion to their real value than in the case of other banks, bankers and moneyed corporations. We think the proof fails to establish this in a manner to justify the interference of a court of equity. *National Bank* v. *Kimball*, 103 U. S. 732, p. 9.

The bill however in its main feature asserts the right to an injunction, on the ground that the act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares, of the debts honestly owing by the shareholders. And the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must of course be reversed, because as to the larger number of the shareholders whose taxes are enjoined, there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are: 1. That one shareholder owning five hundred and thirty-two shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed one dollar, and presented said affidavit to the board of assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Mr. Chauncey P. Williams.

2. The further allegation of the bill on that subject is that other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper reduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases, and from knowledge of the decisions of the Court of Appeals of New

York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court enjoining the collecting officers as to all the tax assessed on the shares of this bank must be reversed, the question arises, what shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction.

With regard to the case of Mr. Williams, we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. The question is, whether the fact clearly established that their demand would have been unavailing dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused — that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett* v. *Hunter*, 9 Wall. 326; *Tacey* v. *Irwin*, 18 id. 549; *Atwood* v. *Weems*, 99 U. S. 183.

Without elaborating the matter we are of opinion, that considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Mr. Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is therefore not now essential to show

such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid. And we are of opinion that it is open to the court below when this case returns to permit such amendment of the pleadings as will enable plaintiff to make proper allegations on that subject, or by reference to a master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with the opinion.

Decree reversed.

Evansville National Bank v. Britton.*

(105 U. S. 322.)

Taxation — deductions — injunction.

The Indiana statute relating to taxation provides that a tax payer may, in estimating his taxable property, deduct his indebtedness from his "credits or money at interest;" "all other demands against persons or body corporate;" "total amount of all credits."

Held, that the shares in a National bank, subjected to State taxation, were entitled to a deduction of indebtedness, and an injunction would lie to restrain the collection of a tax upon such shares where such deduction was not allowed.

APPEALS from the Circuit Court of the United States for the District of Indiana. The opinion states the case.

Miller, J. These are cross-appeals from a decree of the Circuit Court for the District of Indiana, rendered in a suit in chancery, in which the Evansville National Bank was complainant and Britton, as treasurer of Vanderburgh county, was defendant.

The case is in all essential points analogous to that of *Hills* v. *National Albany Exchange Bank*, just decided, *ante*.

*Affirming 18 Fed. Rep. 867.

And the principal question of law is the same as that discussed and decided in the case of *Supervisors of Albany* v. *Stanley*. In fact the three cases were advanced out of their order, and heard consecutively, because they involved important questions concerning taxation by State statutes of the shares of National banks, and the argument, able and exhaustive throughout, has been almost wholly directed, on the part of the banks, to establish the proposition, that where the law of the State either makes or permits a discrimination operating only against a particular class of holders of National bank shares, in the manner of assessing those shares as regards other moneyed capital in the State, all the laws for such assessments are void, and all such assessments are absolutely void, and no tax on National bank shares can be collected in the State.

The brief of counsel in this case in various forms repeats the idea that the bill was brought, not so much to assert the rights of stockholders who may have been injured by the enforcement of the statute, as to obtain a judicial declaration of this court that the act is void, and the attempt to tax the shares of the bank equally so.

We have rejected this proposition in the case of *The Supervisors* against *Stanley*, and have there given our reasons for it, and shall not repeat them here.

The objection made to the Indiana statute is the same as that made against the New York statute, namely, that it permitted the tax payer to deduct from the sum of his credits, money at interest, or other demands, the amount of his *bona fide* indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares.

A distinction is attempted to be drawn between the Indiana statute and the New York statute, because the former permitted the deduction of the tax payer's indebtedness to be made from the valuation of his personal property, while in Indiana he can only deduct it from his credits. And undoubtedly there is such a difference in the laws of the two States. But if one of them is more directly in conflict with the act of Congress than the other, it is the Indiana statute. The subject of taxation from which the

tax payer may deduct his *bona fide* indebtedness is, in the schedule of the act, placed under two heads, as follows:

"1. Credits or money at interest either within or without the State, at par value.

"2. All other demands against persons or bodies corporate, either within or without this State.

"Total amount of all credits."

The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in the case of *Williams* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57, on this point. We are of opinion that the taxation of bank shares by the Indiana statute without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.

There is in the bill of complaint in this case the usual allegation, apart from the special matters we have just considered, that the assessing officers habitually and intentionally assess the shares of the National banks higher in proportion to their actual value than other property generally, and especially shares in other corporations. It is denied in the answer and is unsupported by proof.

It is also alleged that the bank is taxed a considerable sum for its real estate, and that in assessing the value of the shares no deduction is made on that account. The positive testimony of the assessor shows that such deduction was made.

It is alleged that the capital of the bank is almost entirely in vested in the bonds and treasury notes of the United States, and

the shares only represent this untaxable investment. The case of *Van Allen* v. *Assessors*, 3 Wall. 573; 1 Nat. Bank Cas. 1, settles the principle that the shares of the National banks are taxable without regard to the value of the property held by the bank as a corporation having exclusive relation to their value. The very point here made was expressly overruled in that case.

Acting upon these principles the Circuit Court decreed a perpetual injunction as to those shareholders who had proved in the case that at the time of the assessment they owed debts which should rightfully have been deducted. These were four in number, and the appeal of the collector Britton is from this injunction. The decree in that respect was right and must be affirmed.

The bank appeals from that part of the decree which dismissed the bill as to all the other shares. This was because no evidence was given that any other shareholdors except the four above referred to owed any debts which could have been deducted from the value of the shares. In the case of *Hills* v. *National Albany Exchange Bank*, we authorized the court on return of the case to permit the bank to show what shareholders had such indebtedness in some appropriate form. It is not necessary to consider whether this case ought to be reversed at the instance of the bank to enable that to be done now, for it is stated by the counsel of the bank in their printed brief that the offer was made to them to have a reference to a master to take testimony on this point before final decree, and they declined to accept the privilege. That branch of the decree is therefore affirmed on the appeal of the bank.

WAITE, C. J., *dissenting*. I cannot agree to so much of the judgment in this case as affirms that part of the decree below appealed from by Britton, the treasurer. "Credits" are but one of a number of kinds of moneyed capital. They represent, in the classification of taxable property, the ordinary debts due to a person, and it has been common for so long a time in the States to measure their taxable value by their excess over like debts owing to the same person in the same right, that I cannot believe it was the intention of Congress in its limitation on the power of taxing National bank shares to require a deduction of debts from the

value of shares when such a deduction was only allowed to other persons from this one kind of moneyed capital. The law of Indiana expressly prohibits deductions from the value of any other property than credits. Ample provision is made for the taxation of all other moneyed capital at its value without deduction, the same as National bank shares. In *Hepburn* v. *School Directors*, 23 Wall. 485, this court said: "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." In that case a tax on bank shares was sustained when, by law, mortgages, judgments, recognizances, and moneys owing on articles of agreement for the sale of lands were not taxable. I am unable to distinguish this case in principle from that. The exemption here is partial only as it was there.

I am authorized to say that Mr. Justice GRAY concurs in this dissent.

MILLER v. NATIONAL BANK OF LANCASTER.

(106 U. S. 542.)

Jurisdiction — appeal — denial of title, right or privilege.

To give this court jurisdiction on appeal from a State Supreme Court under the National Banking Act, the "title, right, privilege or immunity specially set up or claimed" must be claimed by the plaintiff in error for himself, and not for a third person, in whose title he has no interest.

IN error to the Court of Appeals of the State of Kentucky. Motion to dismiss.

P. Phillips and *W. Hallett Phillips*, for plaintiffs in error.

R. T. Merrick and *M. F. Morris*, for defendants in error.

WAITE, C. J. From this record it appears that one S. W. Miller, being insolvent, made an assignment of his property to M. J. Durham, trustee, for the benefit of his creditors. The trustee afterward instituted a suit in the Boyle Circuit Court of Kentucky to enforce his trust. To this suit S. D. Miller and E. B. Miller, two

of the present appellants, were parties; and in due course of proceeding, a decree was entered for the sale of the assigned property. In this decree it appears that S. D. Miller and E. B. Miller, who were then in possession of part of the premises under a lease, were permitted to hold until the 31st of December, 1880, but it was added:

"Said S. D. Miller and Ed. B. Miller agree to give said trustee the full, entire, and peaceable possession of the house and lands they use and occupy, on or before the thirty-first day of December next, and on their failure so to do, the trustee, Durham, may have a writ of *habere facias possessionam* against each of them, and the clerk of this court is hereby directed to issue the same."

Under this decree the property now in question was sold and duly conveyed to the First National Bank of Danville. The Danville bank afterward sold and conveyed the property to the National Bank of Lancaster, a bank organized under the National Banking Law. Title 62, Rev. St. After these conveyances were made, a writ was applied for under the decree, in behalf of the Lancaster bank, and issued to John Meyer, sheriff of the county, commanding him to take the possession of the property from S. D. Miller and E. B. Miller, and deliver it to Durham, the trustee. Thereupon, S. D. Miller, E. B. Miller and John W. Miller, the last of whom had in some way got into the possession of the property after the decree, filed a petition in the Boyle Circuit Court against the Lancaster bank and the sheriff, to enjoin the execution of the writ, on the ground that it was issued without authority and was void. In this petition it was alleged that the Lancaster bank had no power under its charter to take and hold the property, and that consequently the deed to it was inoperative and void.

There were also allegations of irregularity in the form of the writ, and that since the decree, Durham, the trustee, had sold and conveyed the property to the Danville bank. To this petition the Lancaster bank filed an answer and counterclaim. In the counterclaim the bank set up its title through the sale under the decree. The prayer was that the petition of the plaintiffs be dismissed, and for a judgment for recovery of possession. Upon the hearing, the writ which had been issued was set aside for irregularity, but a new writ was awarded the bank. From a judgment to that effect an appeal was taken to the Court of Appeals of Kentucky, where

the judgment was affirmed. To reverse this judgment of affirmance the present writ of error was brought.

Our jurisdiction depends on the question whether the plaintiffs in error have been denied by the judgment below any "title, right, privilege or immunity specially set up or claimed" under the Banking Act. As early as 1809, it was held by this court in *Owings* v. *Norwood's Lessee*, 5 Cranch, 344, that in order to give us jurisdiction in this class of cases, the right, title or immunity which is denied, must grow out of the Constitution, or a treaty, or statute of the United States relied on. Under this rule, jurisdiction was not taken in that case, although it was an action of ejectment by Norwood's lessee, and the record showed that an effort was made to defeat the recovery because of an outstanding title in a third person adverse to Norwood and protected by a treaty. Chief Justice MARSHALL, in speaking for the court, said: "Whenever a right grows out of or is protected by treaty, it is sanctioned against all the laws and judicial decisions of the States, and whoever may have this right is to be protected. But if the person's title is not affected by the treaty, or if he claims nothing under a treaty, his title cannot be protected by the treaty." The principle thus announced has been recognized in many cases since. *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Henderson* v. *Tennessee*, 10 How. 323; *Wynn* v. *Morris*, 20 id. 5; *Hale* v. *Gaines*, 22 id. 160; *Verden* v. *Coleman*, 1 Black, 472; *Long* v. *Converse*, 91 U. S. 105. *Henderson* v. *Tennessee*, like *Owings* v. *Norwood's Lessee*, was an action of ejectment, and the effort was to defeat the recovery by showing an outstanding title in a third person under a treaty with which the party in possession did not connect himself. But the jurisdiction was denied, Chief Justice TANEY saying in the opinion:

"The right to make this defense, is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger in bar of the action. It is true, the title set up in this case was claimed under a treaty. But to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest."

And in *Hale* v. *Gaines* it was said:

"The plaintiff in error must claim (for himself) some title, right, privilege or exemption under an act of Congress, etc., and the decision must be against

his claim to give this court jurisdiction. Setting up a title in the United States by way of defense, is not claiming a personal interest affecting the subject in litigation."

In our opinion these cases are conclusive of the present motion. The plaintiffs in error set up no title against the bank. In effect, they seek to prevent the issue of an execution on a judgment against them, or those under whom they claim, because, as between the Danville bank and the Lancaster bank, a conveyance made by the Danville bank of the property to be delivered under the execution is inoperative on account of the provisions of the Banking Law. What was done between the two banks had no effect on the title of the parties in possession, and it was a matter of no importance to them whether the execution issued on the application of the one or the other. Clearly therefore the plaintiffs in error occupy no other position than that of parties setting up title in the Danville bank by way of defense, and that is not claiming for themselves any title, right, privilege or immunity given by the law.

The motion to dismiss is granted.

Motion dismissed.

MILLER, J., took no part in the decision of this case.

BOWDEN v. JOHNSON.

(107 U. S. 251.)

Stock — collusive transfer — individual liability of stockholder — enforcement of — party — interest — receivers.

Where a stockholder in a National bank, aware that there is good ground to apprehend the failure of the bank, collusively transfers his shares to an irresponsible transferee, with design to escape individual liability, such transfer will not relieve him from such liability.

The bill being one for discovery as well as relief, and the transfer being good between the parties, the case is one of equitable cognizance.

A letter addressed to the receiver, and signed by the Comptroller of the Currency, directing him to institute legal proceedings to enforce the individual liability of every stockholder, under the statute, is sufficient evidence that the Comptroller decided, before the suit, that it was necessary to enforce the personal liability of the stockholders.

The liability of the stockholders bears interest from the date of said letter.

The decree of the Circuit Court, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as plaintiff, the new receiver becoming a surety in the appeal bond. In this court the new receiver moved to be substituted as plaintiff and appellant, without prejudice to the proceedings already had, and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted, and the second denied.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

J. A. J. Creswell, for appellant.

Thos. N. McCarter, for appellee.

BLATCHFORD, J. George E. Bowden, as receiver of the First National Bank of Norfolk, Virginia, brought this suit in equity against Jacob C. Johnson and Mrs. B. Valentine, alleging, in the bill, that Johnson, owning one hundred and thirty shares of the capital stock of the bank, of $100 each, in order to exonerate himself from liability to the creditors of the bank, transferred said shares to Mrs. B. Valentine, on the books of the bank; that the transfer was made without legal consideration, and with a view to such exoneration; that Mrs. B. Valentine is, and was known by Johnson, at the time of the transfer, to be, utterly insolvent; that the transfer was made with a view of defrauding the creditors of the bank, and therefore was and is void; and that the plaintiff had been appointed, by the Comptroller of the Currency, receiver of the bank, and had been directed by said Comptroller to proceed to enforce the personal liability of all persons owning the capital stock of the bank on the 26th day of May, 1874, the day on which the bank failed to redeem one of its circulating notes, and was in default in the payment of its circulating notes generally. The bill alleges that Johnson visited Norfolk for the purpose of examining into the condition of the affairs of the bank, and, becoming satisfied from such examination, and from other information in relation to the bank, that its affairs were in a critical condition, as in fact they were, and that a suspension of the bank was inevitable, returned to New York and immediately thereafter made said transfer. The prayer of the bill is that

Johnson and Mrs. B. Valentine answer it on oath; that the transfer of the stock be set aside; and that Johnson be decreed to pay to the plaintiff, as such receiver, the par value of the one hundred and thirty shares.

The joint answer of the defendants admits that Johnson became the owner of the one hundred and thirty shares in 1869. It avers that Johnson visited Norfolk in November, 1873, but not for the purpose of examining into the condition and affairs of the bank. It denies that Johnson, on said visit, became satisfied that the affairs of the bank were in a critical condition, and that a suspension of the bank was inevitable. It avers that Johnson went to Norfolk, at that time, to inspect a farm which it was proposed to exchange with him for said stock. It denies that Johnson "then, during that visit, or at any other time, saw any thing in the condition of the said bank," except that William Lamb, who was at that time the president of the said bank, and who went with Johnson to inspect said farm, at the same time proposed that Johnson should lend to the bank $25,000, and proposed to secure the loan by mortgage on the real estate of the bank, which loan Johnson declined to make. Johnson admits that he, on December 5, 1873, sent his said stock to the bank, with the power and direction to have the same transferred to Mrs. Valentine, but he denies expressly that such transfer was made in order to exonerate himself from liability to the creditors of the bank. The answer avers that the actual transfer of the stock, on the books of the bank, was delayed for some time, without the knowledge and against the will of the defendants. It denies that the transfer of the stock was made without legal consideration, or with any view to exonerate Johnson from liability as stockholder. It denies that the defendant Valentine is, or was, at the time of said transfer, known by Johnson "to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors" of the bank. It avers that it is not true that Mrs. Valentine was, at the time of said transfer, insolvent, or that said transfer was made for any such purpose as is alleged in the bill, but avers that it was made in good faith and for a valuable and lawful consideration.

The principal question in this case is as to the circumstances attending the transfer of the stock to Mrs. Valentine. This question divides itself into two branches: (1) The information which Johnson had in regard to the affairs of the bank; (2) the real nature of the transaction between Johnson and Mrs. Valentine.

1. Lamb, the president of the bank, gives the following testimony: In the latter part of 1873, Lamb, owing to the straitened condition of the bank, was anxious to make a loan on its real estate, and wrote to Mr. Cole, the former president, then living in New York, to assist him in doing so. Cole wrote to Lamb that he had a friend, Johnson, who he thought was able to make the loan, and would do so if proper representation could be made to him, and that he would bring Johnson down to Norfolk. Some time in November, 1873, Johnson went to Norfolk with Cole, when Lamb endeavored to get Johnson to make a loan on the banking building of the bank. Lamb told Johnson that the need of a loan was urgent; that he thought the security was good; and he appealed to Johnson as a stockholder to make the loan. Johnson promised, when he returned, to look into his affairs, and to make the loan if he could conveniently do so. Lamb says:

"I cannot remember any of the details of the conversation, nor the full extent given him by me as to the condition of the bank, but my impression is that I called attention to the fact that our capital had been seriously impaired by the Elkton suit, and other litigation, and that the panic had caused us to lose business and be very hard up, and the necessity of having ready money to retain our business and to recover our position. I think I asked for a loan of $25,000 on the building. My conversation was of such a confidential character as I would have only had with one largely interested in the bank. * * * I don't remember whether he examined the books and papers of the bank."

Lamb says that the Elkton suit was one in which a bank obtained a judgment against his bank, after long and expensive litigation, for $30,000; and that the result destroyed about one-half of the capital stock of his bank, which was $100,000.

Chamberlain, who was cashier of the bank, says that Johnson visited Norfolk the latter part of November or about the 1st of December, 1873.

Hunter, who was bookkeeper of the bank and remembers Johnson being at the bank, says that he believes the reports and statements showing the condition of the bank, made up by the

witness as bookkeeper, were taken into the president's room while Johnson was in it, but he cannot state whether they were exhibited to Johnson.

The foregoing is all the direct evidence there is as to Johnson's knowledge of the condition of the bank at the time he returned from Norfolk. Within a very few days after his return he wrote a letter to Lamb, dated December 5, 1873, saying:

"I regret to say that I will be unable to comply with your wishes in letting the First National Bank have $25,000. I cannot raise the money. I was depending for the greater part of it on my folks in San Francisco, and they send me word that they cannot let me have the money, as they need all they can lay their hands on to get through the winter. The bulk of my means is in real estate and cannot readily be converted into cash. I have disposed of my stock in the First National Bank of Norfolk, and inclose certificate of my shares, with power of attorney, etc., to transfer. Please have the stock transferred to Mrs. B. Valentine, and send the certificate to her at Belleville, Essex county, New Jersey."

This letter contained the certificate of stock, with the power of attorney to transfer it.

Lamb, instead of transferring the stock, wrote as follows to Cole, inclosing Johnson's letter:

"I send you the inclosed to show you Mr. Johnson. Please let me know who Mrs. B. Valentine is. I shall make an assessment on our stockholders of fifty per cent. If she is not able to pay it I will not transfer the stock. Please return this letter."

Cole replied:

'Mrs. Valentine is the sister of Johnson, the wife of a poor man that Johnson employs on his farm. I would not transfer the stock, but notify him at once that you have made an assessment of fifty per cent."

These letters were written, Lamb says, in December, 1873. Lamb also says that he was not satisfied from Cole's reply, but found, after obtaining legal advice, that he had no right to refuse the transfer, and therefore he made it, on January 15, 1874.

On the 14th of February, 1874, Lamb wrote as follows to Johnson:

"I find the inclosed certificate has not been forwarded to Mrs. Valentine, although issued a month ago; please hand it to her. I regret not hearing from you in regard to the proposition made by the directors. Something must be done at once. The bank cannot go on as affairs are now, and if I surrender it to a receiver I know our stock will be worthless; the margin is too small. If I could have gotten the refusal of all the stock I might have induced some

capitalists to come in, but I am afraid it is too late now. With $4,000 cash I could have infused new life into our stock and built it right up. Please let me hear from you, as I suppose you must feel an interest in Mrs. Valentine's stock."

Johnson did not offer himself as a witness.

2. Mrs. Valentine was called as a witness by the plaintiff. Her deceased daughter was the wife of Johnson. She herself was divorced from her husband, and he was not dead that she knew of. Johnson had no children. Her daughter died in 1864. She herself lived in California with her husband for thirteen years. She came from California in 1865 or 1866, and went to live at Mr. Johnson's house in Kearney township, New Jersey, in 1871. She was examined as a witness in August, 1877. She endeavors to make out a consideration for the transfer of the stock to her, in this way:

"Mr. Johnson owed me for services rendered after we came to live where we are. He was to pay me $1,000 a year for my services. He was away a great deal of the time, and I took care of every thing while he was gone. He went away two winters to California, and I had the care and responsibility of every thing — the entire place — while he was gone. * * * We have been at the place six years. He was away the second winter; then two winters intervened, and he was away another winter. * * * Question. Please explain why Mr. Johnson should have paid you by the assignment of the Norfolk Bank instead of money, if he was indebted to you and wished to make payment. Answer. Because I preferred that. He would have paid money if I had wished it. I thought it would be less trouble for me in that way, already invested, and I had to pay no taxes. Q. Did Mr. Johnson's engagement to pay you $1,000 per year for services commence at the time you moved to Kearney township, six years ago, as you have said? A. It did. Q. Mr. Johnson has not been indebted to you, has he, for any other matter or thing except such service for the last six years? A. Since my daughter's death I have had all the charge of Mr. Johnson's clothes, and of his house at San Francisco, and here also. There was no agreement between us for compensation till we came here to Kearney. I always supposed he would compensate for these. Q. What price were you to allow Mr. Johnson in payment for that stock? A. Fifty cents on the dollar; that was the price Mr. Lamb, the president of the bank, offered for it at the time Mr. Johnson transferred it to me. Q. Did you suggest to him or he to you the purchase of this stock? A. I really can't tell. I think I proposed to him to take it instead of money. I am not positive. I think that was the way. Q. Please explain, if you can, how you came to the knowledge that he was the owner of the Norfolk Bank stock? A. He told me that he had the stock before he went to Norfolk to see the land that he then thought of exchanging the stock for. I think that was the first I knew of it. Q. And when he came back, or soon after, he proposed to you to take the

stock, did he not? A. It was a long time after he came back; several months I think. Q. Are you not mistaken in saying it was several months? A. It may not have been several months after; it was some time after. Q. Really, Mrs. Valentine, on reflection, was it more than one month? A. Perhaps not. I cannot remember. Q. When Mr. Johnson proposed that you should purchase the stock, what did he propose? Please give me, as near as you can, the language he used in relation thereto. A. I cannot remember the language used. Q. Have you now, or had you at the time you took the assignment of this stock from Mr. Johnson, any money, or any property, to purchase the stock, other than the alleged indebtedness for annual services rendered by you to Mr. Johnson? A. I am not dependent entirely; I am not destitute; have enough to keep me from want. Q. Did you give any money or other valuable thing to Mr. Johnson for the transfer of the stock other than his alleged indebtedness to you for services? A. I told him at the time he might consider all my jewelry his for part compensation Q. He did not accept of the jewelry, did he? A. Well, it remained in the house, as it always had. Q. The stock that Mr. Johnson transferred to you was not paid for by either your obligation or promise of payment further than the alleged indebtedness to you, was it? A. It was not. Q. Had you, at that time, any other stock, bonds, bank account, or money in hand, or on deposit in any bank or banks, or in anywise invested for you or for your use? A. I had no bank account, no stock. I am never without any money to use. I have no bonds. Q. The moneys that you had were merely pocket funds, of small amount, were they not? A. Yes, sir. Q. In what month was the arrangement made between you and Mr. Johnson about the stock? A. In December, 1873. Q. You stated, in reply to the thirty-second direct question, that you thought you proposed to Mr. Johnson to take the stock instead of money. Did you mean to be understood, by any subsequent answer, that the proposition for you to take the stock arose with Mr. Johnson? A. No."

The Circuit Court dismissed the bill, taking, as we think, an erroneous view of Mrs. Valentine's testimony in one important particular. It was assumed that she testified that she had had charge of Johnson's house and family since the death of Mrs. Johnson in 1864, at the fixed compensation of $1,000 per year; that is, that the compensation was for taking care of Johnson's house and family from 1864 until the stock was transferred, in 1873, and that the compensation of $1,000 a year was fixed in 1864. Whereas, what Mrs. Valentine says expressly is that the engagement to pay her $1,000 a year for her services commenced in 1871, when she moved to Kearney township, and not till then; and that what Johnson owed her for was for services rendered after that. The winters Johnson was away were the winters of 1872 and 1875. At most, according to Mrs. Valentine's own story, less than three years' services, at $1,000 a year, had been

rendered by her when she took this stock at $6,500. No alleged indebtedness accruing subsequently to the transfer of the stock in December, 1873, can be looked at. Mrs. Valentine says she supposed Johnson would compensate her for what she had done before she went to Kearney in 1871, but she does not pretend that there was any such obligation recognized by Johnson, or any debt for the same. That Mrs. Valentine, knowing that the alleged indebtedness to her did not amount to the alleged price of the stock, was conscious that the transaction was not an honest one, is shown by her admission that the stock was not paid for by her to Johnson, by either her obligation or promise of payment, further than the alleged indebtedness to her. This was less than $3,000 in December, 1873. To make up the difference between the indebtedness and the $6,500, she resorts to the bald suggestion that she told Johnson at the time that he might consider all her jewelry as his, "for part compensation" for the transfer of the stock, the jewelry remaining in the house as it always had. Equally bald is the suggestion that she was saving trouble in making an investment in a stock that was worth only fifty cents on the dollar.

The conclusion of the Circuit Court was that there was no bad faith or fraud in the transfer. But what are the facts proved? Johnson, being a stockholder, goes to Norfolk and has interviews with the officers of the bank in regard to making a loan of $25,000 to the bank. He is appealed to as a stockholder to make the loan. His position as a stockholder involved not merely the value of the stock, but his liability for $13,000 more. The urgency of the needs of the bank is pressed upon him. The facts that the capital of the bank had been impaired, and that it had lost business, are brought to his attention. The bank had made a dividend in July, 1870, and one in February, 1873, and none since. Can it be doubted, from the foregoing testimony and Johnson's subsequent action, that he examined into the affairs of the bank sufficiently to satisfy himself that the failure of the bank, and the loss of its entire capital stock, and the attaching of the statutory liability of the stockholders, were impending in the near future? He was at Norfolk the last of November or the first part of December. Mrs. Valentine says that the arrangement between her and Johnson about the stock was made in

December. He sends the certificate and the power to Lamb on the 5th of December. He loses no time in assigning his stock. Lamb understood what Johnson was doing. He sent to Cole the letter from Johnson, and directed Cole to inquire as to Mrs. Valentine's responsibility. He received information that she had none, and that she was Johnson's sister. With that knowledge he acted as Johnson's attorney in transferring the stock. He evidently thought there were no *bona fides* in the transfer, for, in his letter sending the certificate to Johnson, although Johnson had instructed him to send it to Mrs. Valentine at a given address, he addresses Johnson as if he were still a stockholder. He refers to the future, and to the necessity of doing something at once, and to the prospective worthlessness of the stock, and winds up with the sarcastic remark that he supposes Johnson must feel an interest in Mrs. Valentine's stock. Mrs. Valentine was wholly unable to respond for any liability as a stockholder. This was known to her and to Johnson. Johnson, notwithstanding all the testimony on the part of the plaintiff, is not sworn as a witness for himself. It is worthy of note that the answer does not set forth what the consideration was for the transfer to Mrs. Valentine The bill alleges that there was no legal consideration. The answer merely avers that the transfer was not without legal consideration, and that it was made in good faith and for a valuable and lawful consideration. It is manifest that, at the very best, on Mrs. Valentine's evidence, supposing it to be entitled to credit, and on her statement of the price at which she took the stock, there was only $2,500 of consideration, at the rate of $1,000 a year for two years and a half, leaving the transfer as to eighty shares of the stock without consideration. The entire theory of the defense is that there was a sale, and not that there was any gift.

The provisions of section 12 of the act of June 3, 1864 (13 Stat. at Large, 102), which govern the present case, are as follows:

"The capital stock of any association formed under this act shall be divided into shares of $100 each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of the shares, and no change shall be made

in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in said shares."

The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him, until without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and the transferrer will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee.

The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that therefore the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *National Bank* v. *Case*, 99 U. S. 632; 2 Nat. Bank Cas. 25, that a transfer on the books of the bank was not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a

person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position, but that is no reason why Johnson should not, at the election of creditors, still be treated as a shareholder, he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the decision of the chief justice in *Davis* v. *Stevens*, 17 Blatchf. C. C. 259.

It urged that, as the bill prays that Johnson may answer its allegations on oath, the answer is evidence in his favor, and is to be taken as true, unless it is overcome by the testimony of one witness and by corroborating circumstances equivalent to the testimony of another witness. 'Under the view we have taken of the case, the only material questions which are controverted are the knowledge and intent of Johnson, and the insolvency of Mrs. Valentine, and the knowledge of the latter fact by Johnson at the time. Although Johnson executed the transfer and power of attorney on December 5, he did not deliver it to Mrs. Valentine. He sent it to Lamb for him to act as attorney. Mrs. Valentine had no agency in it. When the transfer had been made on the books of the bank, and the new certificate was made out, it was sent to Johnson on February 14, for him to deliver it to Mrs. Valentine. The letter of that date from Lamb to Johnson, which inclosed it, was full notice to Johnson that the condition of the bank was growing worse. His contract with Mrs. Valentine, if there was one, was not fully consummated on his part till after that. There was no delivery of any thing by him to her till after that. On the whole evidence, the intent of Johnson, though denied in the answer, is abundantly proved, because the facts from which the conclusion as to such intent flows are satisfactorily established, to an extent sufficient to satisfy the rule of equity. As to Mrs. Valentine's insolvency, she herself proves it conclusively, and she states facts which show that Johnson must have known it. She could give him nothing, according to her story, to answer for the $4,000 balance due him on the stock, and was reduced to telling him he might consider her jewelry his, for part compensation. Under all these circumstances, the omission of Johnson to

testify as a witness for himself, in reply to the evidence against him, is of great weight. This case, on the whole, is brought within the principle asserted by Chief Justice MARSHALL, speaking for this court, in *Clark* v. *Reimsdyke*, 9 Cranch, 153, as a case where the evidence arising from circumstances is stronger than the testimony of any single witness. In 3 Greenl. Ev., § 289, it is stated as a rule that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself, or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge.

It is contended for the appellees that this is not a case of equitable cognizance, because a plain, adequate, and complete remedy may be had at law. But the case is one of a transfer of the legal title to the stock, made to defraud the creditors of the bank. The evidence of title to the stock is the formal assignment on the books of the bank. This being a bill for discovery as well as relief, and the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, it is clear that equity has jurisdiction to set it aside and enforce the liability of the transferrer.

Objection is taken here, by the appellees, to the sufficiency of the proof that the Comptroller of the Currency decided, before this suit was brought, that it was necessary to enforce the personal liability of the stockholders. The plaintiff, as a witness, testified that he received written instructions from the Comptroller of the Currency to enforce the whole of the personal liability of the stockholders. The defendant Johnson objected that the written evidence referred to must be produced. The record states that the plaintiff reserved the right to file the paper, or a duly-certified copy of it, with the deposition, before the same should be closed. Before the deposition was closed the witness was recalled, and produced, as the record states, the original letter addressed to him and signed by the Comptroller, and it was filed with the deposition. No objection was made to it, and no requirement of further proof was made. It directs the receiver to institute legal

proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability as such stockholder under the statute. This was sufficient.

The liability of the defendant bears interest from the date of said letter, August 13, 1875. *Casey* v. *Galli*, 94 U. S. 677; 1 Nat. Bank Cas. 142.

In June, 1878, Orson Adams was appointed receiver of the bank, in place of Bowden, the plaintiff. The decree of the Circuit Court was not made till January, 1879. The appeal to this court was taken in the name of Bowden, Adams not having been substituted as plaintiff. Adams became surety in the appeal bond, and thus treated the decree as valid and adopted the appeal. Adams now moves to be substituted as plaintiff and appellant in place of Bowden, without prejudice to the proceedings heretofore had. The appellees and their counsel first heard of the appointment of Adams from the papers served on the motion for substitution, and the appellees now move to dismiss the appeal, on the ground that none was ever lawfully taken. We think that the motion of Adams should be granted, and that of the appellees should be denied. Adams prosecuted the appeal in the name of Bowden, whowas and is in life, and had a representative capacity. The power of amendment to this extent is authorized by section 954 of the Revised Statutes. It is of the same character as that exercised by this court in *Gates* v. *Goodloe*, 101 U. S. 612, where a writ of error was sued out by two bankrupts after their discharge in bankruptcy, and this court, on a motion to dismiss the writ, and a counter-motion by the assignee in bankruptcy to be substituted as plaintiff in error, denied the former motion and granted the latter.

The motion of Adams is granted, and that of the appellees is denied, and the decree of the Circuit Court is reversed, with costs, and the cause is remanded to that court, with directions to enter a decree in favor of the substituted plaintiff as receiver, setting aside, as against him, the transfer of the one hundred and thirty shares of stock by Johnson to Mrs. Valentine, and decreeing that Johnson pay to said receiver the sum of $13,000, with interest thereon, at the lawful rate in the State of New Jersey, from August 13, 1875, with costs.

Cook County National Bank v. United States.*

(107 U. S. 445.)

Insolvency — rights of United States as creditor.

The provision of U. S. Rev. Stat., section 3466, that "whenever any person indebted to the United States is insolvent the debts due to the United States shall be first satisfied" does not apply to an insolvent National bank.

The United States may not claim a payment of their demand against a National bank out of surplus moneys remaining in the treasury of the proceeds of bonds deposited as security for the circulating notes of the bank.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal from a decree of the Circuit Court overruling a general demurrer to a bill filed by the United States against the Cook County National Bank of Chicago, Illinois, and Augustus H. Burley, its receiver. The facts as stated in the bill, are briefly as follows: Previously to 1872 the bank was formed under the acts of Congress authorizing the organization of National banks, and was designated as a depository of moneys of the United States. In January, 1875, it became insolvent and suspended business. In February following, Burley was appointed, by the Comptroller of the Currency, its receiver, and he immediately entered upon the discharge of his duties.

At the time of its suspension, the bank had on deposit, "of postal funds," $24,900, and "of money-order funds," $14,684, which are respectively designated on its books by those names. These moneys had been deposited with the bank by John McArthur, a deputy postmaster at Chicago.

The treasury department at the time held United States bonds, placed with it by the bank, to the amount of $150,000 par value, as security for all public moneys which might be deposited with the bank. These bonds were afterward sold for $174,544.52. Of the proceeds, $155,305.47 were appropriated to pay the amount then on deposit with the bank to the credit of the Treasurer of the United States. Of the balance remaining, $11,803.98

* Reversing 2 Nat. Bank Cas. 128.

were applied on the "postal funds," and $7,435.07 on the "money-order funds" deposited by the deputy postmaster at Chicago, leaving still due on account of those two funds $20,344.95.

In addition to these bonds, there were at the time, in the treasury department, United States bonds to the amount of $100,000 par value, deposited by the bank to secure its notes issued for circulation. When in 1875 the bank failed to pay these notes, the Comptroller of the Currency declared the bonds forfeited to the United States. A part of them have been sold, and it is the intention of the treasury department to sell the remainder, and apply the proceeds to pay the notes in circulation, and reimburse the United States for sums already advanced for that purpose. The proceeds of all the bonds, when sold, will be sufficient to redeem the notes, reimburse the United States, in full for their advances, and leave a balance exceeding $30,000, more than sufficient to pay the debts due by the bank to the United States for postal funds and money-order funds, deposited by the deputy postmaster at Chicago.

The treasury department, in addition to the bonds to secure the circulation of the notes, has a sum exceeding $30,000 belonging to the bank, collected from bills receivable and debts due to it; but its liabilities notwithstanding greatly exceed its assets.

Upon these facts the question arose, whether the claim of the United States for moneys deposited by the deputy postmaster is a preferred debt or not; and the officers of the United States are in doubt as to their duty on the subject, that is, whether they should reserve from the funds in the treasury department belonging to the bank a sufficient amount to pay the debt for postal funds and money-order funds due to the United States, or whether they should distribute the said moneys *pro rata* to all the creditors of the bank, including the United States.

The bill prays that an account be taken of the amount due to the United States by the bank for moneys so deposited with it by the deputy postmaster, and that a decree be entered directing the disposition of the funds belonging to the bank in the control of the treasury department.

The defendants treated the bill as filed to obtain a decree adjudging to the United States a priority in the payment of their

demand against the bank for the balance due on the postal and money-order funds, and interposed a general demurrer to it. The court, taking a similar view of the bill, overruled the demurrer. The defendants thereupon elected to stand by their demurrer, and as they at the same time admitted that the bank had a sufficient amount to pay the whole of principal and interest due to the United States for the funds deposited by the deputy postmaster and postal funds, and as money-order funds, the court ordered that the amount thus due should be paid in full out of the assets of the bank. From this decree the appeal was taken.

Roscoe Conkling and *Henry S. Monroe*, for appellants.

W. C. Goudy, for appellee.

FIELD, J. The Revised Statutes in section 3466 provides that:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This section is substantially a copy of section 5 of the act of March 3, 1797, entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money." Statutes passed before 1797 embodied similar provisions and also declared that parties who are sureties of insolvents may pay to the United States any balance due to them, and have the same priority in the payment of their demands out of the estates of such insolvents as the United States would have if no such payment were made.

The language of the section in the Revised Statutes is general and comprehensive in its terms, and applies to demands of the United States against any insolvent person living, or the estate of any insolvent person dead; and also to demands against any person, who, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, and against any estate

of an absconding, concealed or absent debtor, whose effects have been attached by process of law.

The question is whether, under this broad and general language, the United States, having demands against an insolvent National bank, are entitled to priority of payment out of its assets over other creditors. The appellants contend that the statute refers to such insolvency as is determined by judicial decree, as under a bankrupt act or is manifested by the debtor's voluntary assignment of his property, or by its attachment under process against him, as an absconding, concealed or absent debtor, and that within this meaning the Cook County National Bank never became insolvent, and that therefore the provisions giving priority of payment to demands of the United States against insolvents do not apply.

From the view we take of the act authorizing the formation of National banks, it is unnecessary to consider whether or not this position is tenable. We consider that act as constituting by itself a complete system for the establishment and government of National banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied toward such payment. Every thing essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

In the first place, the banks are required to deposit with the Treasurer bonds of the United States as security for any notes that may be issued, the amount of which cannot in any case exceed ninety per cent of the par value of the bonds. R. S.,

§ 5171. Should the market or the cash value of the bonds become reduced at any time below the amount of the notes issued, the Comptroller of the Currency may require that the amount of the depreciation be deposited with the Treasurer in other United States bonds, or in money, so long as such depreciation continues. R. S., § 5167. In case of the refusal of a bank to pay its notes, the bonds may be sold at public auction in the city of New York, and their proceeds applied to reimburse the United States the amount expended by them in paying the circulating notes; and for any deficiency which may remain, the United States are entitled to a paramount lien upon all the assets of the bank, which is to be paid in preference to all other claims, except for costs and necessary expenses in administering the same. R. S., § 5230.

In the second place, when the banks are made depositaries of public moneys and employed as financial agents of the government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security by the deposit of United States bonds, or otherwise, for the safe-keeping and prompt payment of the public money deposited, and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not theretofore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. R. S., § 5497. The government can thus always have security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any National bank.

With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the government should call for such security, and if it prove insufficient, take the position of other creditors in the distribution of the assets of the bank in case of its failure. The framers of the Banking Law evidently so regarded the matter. After providing for the appointment of a receiver by the Comptroller of the Currency upon the suspension or failure of a bank, the law requires the receiver to take possession of its books and records, and assets of every description, and to collect all debts, dues and claims belonging to it; and

authorizes him, upon an order of a court of competent jurisdiction, to sell or compound bad or doubtful debts; to sell the real or personal property of the bank, and if necessary, in order to pay its debts, to enforce the individual liability of its stockholders, and it directs him to pay over all moneys thus received to the Treasurer of the United States, subject to the order of the Comptroller of the Currency. It also requires the Comptroller, upon appointing a receiver, to cause notice to be published, calling upon all persons having claims against the bank to present the same with legal proof thereof. It then declares as follows, in section 5236:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed as directed, by a ratable dividend to all holders of claims, that is, to all creditors.

These provisions must be deemed therefore to withdraw National banks, which have failed, from the class of insolvent persons out of whose estates demands of the United States are to be paid

in preference to the claims of other creditors. The law of 1797, re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the National Banking Law being, as applied to demands against National banks, inconsistent and repugnant, the former law must yield to the latter, and is to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. *Davies* v. *Fairbairn*, 3 How. 636; *United States* v. *Tyner*, 11 Wall. 88.

In addition to these conflicting provisions in the Banking Law, necessarily superseding those of the law of 1797, as to the priority of the United States in the payment of their demands out of the estates of insolvents, there is the significant declaration of the Banking Law that for any deficiency in the proceeds of the bonds deposited as security for the circulating notes of the bank, the United States shall have a paramount lien upon all its assets, which shall be made good in preference to all other claims, except for costs and expenses in administering the same. This declaration was unnecessary and quite superfluous if for such deficiency the United States already possessed, under the act of 1797, the right to be paid out of the assets of the bank in preference to the claims of other creditors. The declaration considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed.

This view of the Banking Law is not affected by the subsequent

enactment in 1867 of the Bankrupt Act, giving priority to the demands of the United States against the estates of bankrupts. That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their estates. It has no further reach.

It remains only to consider whether the United States have the right to claim the payment of this demand out of the surplus moneys remaining in the treasury of the proceeds of the bonds deposited as security for the circulating notes of the bank. The surplus is sufficient to pay the demand of the United States in full. Can the United States set off their demand against these proceeds? We have no hesitation in answering this question in the negative. The bonds were received in trust as a pledge for the payment of the circulating notes. The statute so declares in express terms. R. S., §§ 5162 and 5167. They were to be returned to the bank when the notes were paid, if not sold to reimburse the United States for moneys advanced to redeem the notes. The bank could have claimed their return at any time upon a surrender of the notes. The surplus constituted the assets of the bank, and part of the fund appropriated by the statute for its creditors. It was charged with this liability, and was held subject to it after the purposes of the original trust were accomplished, although remaining in the treasury. It was then subject to a new trust. A trustee cannot set off against the funds held by him in that character his individual demand against the grantor of the trust. Courts of equity and courts of law will not allow such an application of the funds so long as they are affected by any trust. It would open the door to all sorts of chicanery and fraud. The fund must be relieved from its trust character before it can be treated in any other character.

This doctrine is well illustrated in the case of *Sawyer* v. *Hoag*, 17 Wall. 622. There a stockholder indebted to an insolvent corporation for unpaid shares, undertook to set off against the claim upon him a debt due to him by the corporation. But it was held that this could not be done. Said the court, speaking by Mr. Justice MILLER: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and

this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

Here the surplus being a fund for all the creditors, was subject to be distributed to them immediately upon the reimbursement of the advances of the United States, and the right of the creditors to it was not affected by the fact that it was at the time in the actual possession of the treasury department.

Nor is the relation of the United States to this fund changed by the forfeiture of the bonds, which the Comptroller of the Currency was authorized upon the failure of the bank to declare. The forfeiture was not a confiscation of the bonds to the government. It amounted only to an appropriation of them, against any other claim, to the specific purposes for which they had been deposited, authorizing their cancellation at market value when not above par, or their sale so far as necessary to redeem the circulation or reimburse the United States for moneys advanced for that purpose. When that purpose was accomplished, the bank had the right to any surplus of their proceeds, equally as though that right had been in express terms declared.

It follows from the views expressed that the decree of the court below must be reversed and the cause be remanded, with directions to sustain the demurrer and dismiss the bill; and it is so ordered.

UNITED STATES v. BRITTON.

(107 U. S. 655.)

Criminal law — indictment for false entries — sufficiency.

In an indictment of an officer of a National bank, under section 5209, R. S., for making false entries in a book, report or statement of such association, with an intent to injure and defraud the association, or deceive an agent appointed to examine the affairs of such association, it is not necessary to aver that the false entry was made "in an account of, and in due course of the business of the bank."

Where the entries alleged to be false are unintelligible without explanation, the pleader may explain them by innuendo.

When the falsity of the entry does not consist in the fact that there was no interest due from the person named, but in the fact that money which the entries declared had been received from him on account of interest due had not been received from him on that or any other account, it is unnecessary to aver that no such interest was due.

Any false entry in any account-book of a bank is calculated to deceive, although it might be readily detected by examination of other books of account.

The statute which punishes false entries to deceive agents appointed under section 5240, R. S., to examine the affairs of National banks, refers to such entries whether before or after the appointment of the agent.

A charge that false entries were made with intent "to injure and defraud the said association, and certain persons to the grand jury unknown," following the language of the statute, is sufficient.

The willful misapplication of the moneys and funds of the bank which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company, other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person, and it must be charged in the indictment that such misapplication was so made; and where the counts in an indictment charge the fraudulent purchase by the defendant, as president of a banking association, of certain shares of stock "in trust for the use of said association, and which shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," they do not charge a criminal misapplication of funds, but a mere maladministration of the affairs of the bank.

The manner in which the misapplication was made, and that it was an unlawful one, must be shown by the averments.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

Section 5209 of the Revised Statutes of the United States is as follows:

"Every president, director, cashier, teller, clerk or agent of any" National banking "association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, or assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of the association, with

intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of the association; and every person who with like intent, aids or abets any officer, clerk or agent in any violation of this section — shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

An indictment based on this section was, on January 20, 1879, found against defendant, James H. Britton, in the District Court of the United States for the Eastern District of Missouri. It contained one hundred and nineteen counts. The first count charged as follows:

"That James H. Britton, late of said district, on the thirtieth day of June, A. D. 1876, at said district, being then and there president of a certain National banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an act of Congress entitled 'An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 8, A. D. 1864, and which said association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as 'Profit and Loss, No. 6,' a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following; that is to say:

"'*Richard L. Dickson:*

"'182 days' int., 8 per cent., 132,673.49, to July 1, '76, - - - 5,365 88'

— and which said entry, so far as aforesaid made in said book, then and there purported to show, and did in substance and effect, indicate and declare, that the sum of $5,365.88 was then and there received by said association on account of interest then and there due and payable to said association by one Richard L. Dickson.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this: that the said sum of $5,365.88 was not then and there received by said association on account of interest then and there due and payable to said association from the said Richard L. Dickson, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this: that the said sum of $5,365.88 was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid with the intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary

to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The thirty-four counts next following, numbered from two to thirty-five inclusive, charged, in the same language, the making of similar false entries in the same book with the same intent.

The thirty-sixth count was in all respects similar to the preceding thirty-five counts, except that it omitted the averment that the false entry was made with the intent "to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association," and in lieu thereof alleged it to be with intent "to injure and defraud the said association and certain persons to said jurors unknown."

The thirty-seventh count charged as follows:

"That the said James H. Britton, late of said district, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, being then and there president of a certain National banking association then and there known and designated as the 'National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an act of Congress entitled 'An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did pay to a certain person, to the jurors aforesaid unknown, a large sum of money, to-wit, twenty-four hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to-wit, forty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Francis Fisher.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, willfully misapply the said sum of twenty-four hundred dollars of the moneys and funds as aforesaid of said association, with intent then and there, on the part of him, the said James H. Britton, to injure and defraud the said association and certain persons, to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The next following nineteen counts, numbered from thirty-eight to fifty-six, inclusive, are similar to count thirty-seven, and need not be set out.

The next succeeding counts, numbered from fifty-seven to seventy-six, inclusive, but excepting the seventy-fourth, are similar to count thirty-seven, except that they omit the averment that the misapplication was made with intent "to injure and defraud the said association and certain persons to the jurors aforesaid unknown." These counts aver no intent whatever. The seventy-fourth count is similar to the thirty-seventh.

The next twenty counts, numbered from seventy-seven to ninety-six, inclusive, are in all respects similar to count thirty-seven, except that they contain the following additional averment, forming the conclusion of the first clause of the account, namely, "and which said shares of stock, so purchased as aforesaid, were then and there held by him, the said James H. Britton, in trust for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said association in good faith."

The next twenty counts, numbered from ninety-seven to one hundred and sixteen, are all similar to count ninety-six, except that they omit the averment that the misapplication of the funds of the association was with the intent "to injure and defraud the said association and certain persons to the jurors aforesaid unknown." These counts charge no intent.

The count numbered one hundred and seventeen was similar to count thirty-six, and count numbered one hundred and eighteen was similar to count one.

As no division of opinion respecting count numbered one hundred and nineteen is certified, it is unnecessary to notice that count.

The defendant demurred to the indictment. By order of the District Court the indictment was, on May 16, 1879, remitted and transferred to the next regular term of the United States Circuit Court for the Eastern District of Missouri, at which term the cause was heard upon the demurrer. Upon such hearing the following questions arose, upon which the judges of the Circuit Court were divided and opposed in opinion, namely:

(1) Whether it was necessary, in the counts of said indictment charging a fraudulent purchase by the defendent of certain shares of the capital stock of said association, to state for whose use the purchase was made, and whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment.

(2) Whether it was necessary in the said counts to allege that the purchase of stock was not made in order to prevent loss on some previously-contracted debt.

(3) Whether it was necessary in the said counts to set forth the means by which the defendant, as president of said bank, possessed himself of the moneys of the bank, which he employed in purchasing said stock.

(4) Whether it was necessary to charge in the said counts that the defendant, as president of the bank, was in possession of funds of the bank, in addition to charging misapplication of said funds.

(5) Whether the counts of said indictment charging the fraudulent purchase by the defendant, as president of said banking association, of certain shares of stock "in trust, for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith," alleged with sufficient certainty an offense under said section 5209 of the Revised Statutes of the United States.

(6) Whether count numbered one hundred and sixteen of the said indictment charges with sufficient certainty an offense under said section 5209 of the Revised Statutes of the United States.

(7) Whether it is necessary in an indictment under section 5209 of the Revised Statutes, charging willful misapplication of the funds of a banking association, to allege that such misapplication was with intent to defraud.

(8) Whether the purchase of stock in violation of section 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said section 5209 of the Revised Statutes, is a crime punishable under the latter section.

(9) Whether those counts which cover alleged false entries sufficiently state an offense under section 5209.

These questions, together with the pleadings upon which they arose, were, on motion of counsel for the United States, certified by the judges of the Circuit Court to this court for its opinion thereon.

Assistant Attorney-General Maury, for the United States.

J. B. Henderson, *Geo. H. Shields*, and *Chester H. Krum*, for Britton.

Woods, J. In passing upon the questions certified to us by the Circuit Court, it will be convenient to follow the order in which they have been argued by counsel, rather than that in which the questions are presented by the certificate of division.

The section of the Revised Statutes upon which the indictment is based, creates and describes certain offenses, and expressly

denominates them misdemeanors. In the case of *U. S.* v. *Mills*, 7 Pet. 138, it was said by this court that "the general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony and with respect to some crimes where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged."

In the case of *U. S.* v. *Simmons*, 96 U. S. 362, it was said by this court, speaking by Mr. Justice HARLAN, that "when an offense is plainly statutory, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter;' but to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution against him."

So in the case of *U. S.* v. *Carll*, 105 U. S. 611, it was said by Mr. Justice GRAY, speaking for the court, that "in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes in the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In the case of *U. S.* v. *Pond*, 2 Curt. 265, the rule was thus stated by Mr. Justice CURTIS: "It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offense in the words of the statute, * * * unless they embrace cases which

it was not the intention of the Legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded."

Applying the rules thus laid down to the counts of the indictment, we are to consider whether they sufficiently state an offense under section 5209 of the Revised Statutes.

To describe the offense charged in the first thirty-six counts of the indictment, section 5209 requires the following averments:

(1) That the accused was the president or other officer of a National banking association, which was carrying on a banking business.

(2) That being such president or other officer, he made in a book, report or statement of the association, describing it, a false entry, describing it.

(3) That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association.

(4) Averments of time and place.

An examination of the counts under consideration shows that they contain all these averments pleaded with clearness and reasonable certainty. They must therefore be held sufficient, unless some of the objections made to them by counsel for defendant are well taken.

It is urged that these counts are defective because they do not contain an averment that the false entry was made "in an account of, and in the due course of, business of the bank." Neither of these averments is required by the statute. It is alleged that the false entry was made in a book belonging to and in use by the association in transacting its banking business, and known and designated as "Profit and Loss, No. 6." To hold this insufficient would carry refinement in criminal pleading to an impracticable extent. The counts point out to the defendant and the court, with certainty and precision, the book used by the association in which the false entry was made, and this is all that is necessary under the statute.

It is next objected that the false entries as set out in the counts do not of themselves have any significance, and are unintelligible without explanation. This is mere assumption. Conceding that the entries may be unintelligible to persons not skilled as accountants, it does not follow that they are so to the agent appointed by the Comptroller, who, it is alleged, was the person whom the en-

tries were intended to deceive. But if the entries needed explanation, it was perfectly competent for the pleader to explain them by innuendo. *Rex* v. *Gripe*, 1 Ld. Raym. 256; *Rex* v. *Aylett*, 1 T. R. 63; *Rex* v. *Taylor*, 1 Camp. 404; *Reg.* v. *Virrier*, 12 Ad. & El. 317; *Mix* v. *Woodward*, 12 Conn. 262; *Van Vechten* v. *Hopkins*, 5 Johns. 211; 4 Am. Dec. 339. This he has done by averring what the entries purported to show, and did in substance indicate and declare. Having explained the entries, he avers them to be false. To hold this insufficient would be to decide that the making of false entries in the books of a banking association, in the usual method of book-keeping, and which were intelligible to all accountants, could not be punished under the statute because not intelligible to persons generally, or to persons not skilled in book-keeping.

It is next objected that the counts under consideration are argumentative and repugnant, because they do not allege that interest was due to the association from the individuals named in the alleged false entries. This objection is not well founded. Whether interest was due or not is quite immaterial. The charge is that a false entry was made on the books of the association which purported that a certain sum was, on a day named, received from a person named, on account of interest then and there due from him to the association; that the said sum was not then and there received on account of interest due, and was not received on any account from any sources whatever. The falsity of the entry does not consist in the fact that there was no interest due from the person named, but in the fact that money, which the entries declared had been received from him on account of interest due, had not been received from him on that or any other account. It was therefore entirely unnecessary to aver that no such interest was due, and the want of such averment does not render the counts argumentative or repugnant.

It is further objected to these counts that a false entry to the credit of profit and loss alone, could not deceive a bank examiner, and therefore that the counts are repugnant. This is also mere assumption. But if the false entry is calculated to deceive, the making of it in the books of the association, with intent to deceive, is all that is necessary to bring the act within the meaning of the

statute. It is perfectly apparent that any false entry in any account book of a bank used in transacting its banking business is calculated to deceive. The fact that its falsity may be exposed by an examination of other books of account, does not render it any the less a false entry made with intent to deceive. The circumstance that the attempt to deceive by making a false entry was not an adroit and skillful one, does not relieve the act of its criminal character.

It is further contended that the counts under consideration are insufficient, because it is not alleged that at the time the false entries were made, an agent had been appointed to examine the affairs of the association. This objection is based on the theory that the statute was designed to punish only those officers of a banking association who made false entries in its books with intent to deceive examiners appointed before the false entries were made. We do not think the statute will bear this construction.

The appointment of agents to examine the affairs of National banking associations is provided for by section 5240 of the Revised Statutes, which declares:

"The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association."

It appears from this section that the appointment of these agents is not permanent, but occasional and temporary, and that the appointments are made as often as shall be deemed necessary and proper. It is therefore apparent that the statute which punishes false entries, made with intent to deceive such agents, refers to any entries made with that intent, whether before or after the appointment of the agent.

There is nothing impossible in the averment that false entries have been made with intent to deceive an agent to be appointed after they are made. The agents are often purposely appointed without notice to the association. The fact that the Comptroller of the Currency has information that the officers of an association are making false entries in its books may be the occasion for appointing an agent to examine its affairs. To hold that the officers of

the association would only be punishable for false entries made after an agent had been appointed, would rob the law of a large part of its salutary effect. Its purpose is clear to punish all false entries in the books of the bank, no matter when made, if made with intent to defraud the association or deceive the examiner. We think that in respect to the point under consideration the indictment is sufficient.

We are of opinion that none of the objections raised to the first thirty-five counts are well taken. They are refined and unsubstantial, and not sustained by the rules of criminal pleading in cases of misdemeanor, or by the fair construction of the statute on which the indictment is based. These counts embody the language of the statute; they charge every element of the offense created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend. They are therefore sufficient. *U. S.* v. *Cook*, 17 Wall. 168, and cases already cited.

The thirty-sixth count differs from the first thirty-five in charging the intent with which the offense was committed. The intent is charged to be "to injure and defraud the said association, and certain persons to the grand jurors unknown." This follows the language of the statute.

Clearly it is possible to injure and defraud the association or its stockholders or other persons by false entries in its account of profit and loss. The charge is not repugnant or impossible. We are of opinion therefore that the first thirty-six counts of the indictment, being those which charge false entries in the books of the association, sufficiently state an offense under section 5209. It follows that count one hundred and seventeen, which is in all respects similar to count one, and count one hundred and eighteen, which is in all respects similar to count sixty-six, are good and sufficient.

We shall next consider count numbered seventy-seven and the similar counts. That portion of the section on which they are based makes it an offense for the president or other officer of a banking association to embezzle, abstract or willfully misapply the moneys of the association with intent to injure or defraud the association, or any company or person.

The seventy-seventh count of the indictment charged that the defendant being president of the association, paid to a certain person unknown the sum of $2,400 of the moneys of the association in the purchase of forty shares of its capital stock, which stock, so purchased, was held by the defendant in trust for the use of the association, and the same was not purchased to prevent loss on any debt theretofore contracted with the association in good faith, and that so the defendant did willfully misapply the moneys of the association with intent to injure and defraud the association and certain persons to the grand jurors unknown. The question is propounded to us whether this count sufficiently describes an offense under section 5209 of the Revised Statutes. The purchase of its own stock by the association, except to secure a debt due it, is forbidden by law. Is a purchase for the use of a banking association of its own stock by its president, when not necessary to secure a debt due the association, a willful misapplication of its funds, punishable by section 5209? We think the willful misapplication, made an offense by this statute, means a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts therefore charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds.

If we hold these counts to be good, then every official act of any officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209.

For instance, section 5200 of the Revised Statutes declares that "the total liabilities to any association of any person * * * for money borrowed * * * shall at no time exceed one-tenth

part of the capital stock of the association actually paid in." Section 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk or agent of a banking association, who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds. So, by section 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited, and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute, even though with intent to injure some corporate body or natural person, it could hardly be claimed that the directors who made the order, and the other officers or agents of the association who, with a like intent, had any hand in making the purchase or in paying out the money of the bank therefor, would be liable to indictment and imprisonment under section 5209.

The act charged by the counts under consideration are precisely of the same character as those just mentioned. They are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by section 5239, which declares:

"If the directors of any National banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title ("National Banks"), all the rights, privileges and franchises of the association shall be hereby forfeited. * * * And in case of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

We are therefore of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the as-

sociation, with intent to injure and defraud the association or some other body corporate, or some natural person.

As the counts under consideration, namely, count seventy-seven, and the similar counts down to and including count ninety-six, do not show that the willful misapplication therein alleged was made by the defendant for his own use, benefit or advantage, but for the use of the association, we are of the opinion that they do not allege an offense under section 5209, and are therefore insufficient and bad. The counts are in our opinion, bad also for repugnancy. They aver that the defendant purchased the shares of the association and held them in trust for the association. This charge, without further averments, is clearly repugnant. It is true that it is possible for an officer of a banking association, with intent to defraud it, to misappropriate its funds in the purchase for its use of its own stock. But the count which avers such an act should also make other averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication, by which it was possible that the association could be defrauded.

For the reasons assigned, the counts next following, numbered from ninety-seven to one hundred and sixteen, inclusive, which are similar to count seventy-seven, except that they severally fail to aver that the act therein charged was done with intent to injure and defraud, must be held to be insufficient. The counts last mentioned, as well as the counts numbered from fifty-six to seventy-six, inclusive, are bad for the further reason that they fail to aver any intent to injure and defraud mentioned in section 5209. The intent to injure and defraud is an essential ingredient to every offense specified in the section, and the failure to aver the intent is a fatal defect in the counts in which it occurs.

We shall next consider count numbered thirty-seven, and the counts which are similar to it. These counts simply charge that the defendant being president of the association, willfully misapplied its moneys and funds by buying therewith certain shares of its stock, with intent to injure and defraud the association and certain persons to the grand jurors unknown.

The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing

any offense at common law. They have no settled technical meaning like the word "embezzle," as used in the statutes, of the words "steal, take and carry away," as used at common law. They do not therefore of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one. These averments the pleader has in these counts attempted to make by charging that the defendant paid out the funds of the association in the purchase of its own stock. But this is not necessarily an unlawful use of the funds of the association. It is not every purchase of its own shares by an association that is forbidden. The very section (5201) and sentence of the statute which declares that no banking association shall be a purchaser of its own shares, contains the exception "unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." This exception should have been negatived in these counts. The rule of pleading as laid down by Mr. Chitty, is that "when a statute contains provisos and exceptions in distinct clauses it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos it contains. On the contrary, if the exceptions themselves are stated in the enacting clause it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." 1 Chit. Crim. Law, *283, *284.

Thus where a statute declared that if one on the Sabbath day "shall exercise any secular labor, business or employment, except such only as works of necessity and charity, he shall be punished," etc., a negative of the exception was held indispensable. *State* v. *Barker*, 18 Vt. 195. See also *Com.* v. *Maxwell*, 2 Pick. 139; 1 East, 167; *Spieres* v. *Parker*, 1 T. R. 141; *Gill* v. *Scrivens*, 7 id. 27; 1 Bish. Crim. Proc., § 636.

The failure of the counts under consideration to aver that the purchase of the shares of the association was not necessary to prevent loss upon a debt previously contracted in good faith is a

fatal defect. These counts merely charge that the defendant willfully misapplied the funds of the association, and then aver a use of the funds, which, from all that appears to the contrary, was a perfectly lawful application of them. The result is that no offense is described in the counts numbered from thirty-seven to fifty-six, inclusive, and that they are therefore insufficient and bad. It also follows that counts numbered from fifty-seven to seventy-six, inclusive, which are similar to the series just mentioned, except that they contain no charge of intent to injure and defraud, are also bad.

What we have said disposes of all the questions propounded to us which it is necessary that we should answer. We answer the first, second, seventh and ninth questions in the affirmative, and the fifth, sixth and eighth questions in the negative. From these answers it appears that all the counts from the thirty-seventh to the one hundred and eighteenth inclusive, are insufficient and bad. We therefore decline to answer the third and fourth questions, which relate to the same counts. *U. S.* v. *Buzzo*, 18 Wall. 125.

UNITED STATES v. CURTIS.

(107 U. S. 671.)

Criminal law — indictment — false affidavit — oath — notary.

Before the passage of the act of February 26, 1881, notaries public in the several States had no authority to administer to officers of National banking associations the oath required by section 5211, Revised Statutes, and an indictment against an officer of a National bank under section 5292 for a willfully false declaration or statement in a report made under section 5211, so verified, would not lie.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

Asst. Atty.-Gen. Maury, for United States.

Chester H. Krum, for Curtis.

HARLAN, J. This case comes before us on a certificate of division as to certain questions of law arising in a criminal prosecution against Edward P. Curtis, based upon sections 5211 and 5392 of the Revised Statutes of the United States. The first of those sections provides that every National banking association "shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors. Each such report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper where such association is established," etc.

Section 5392 provides that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The willfully false declarations or statements which the defendant is charged to have made are contained in several written reports transmitted to the Comptroller of Currency by the National Bank of the State of Missouri, in St. Louis, in pursuance of section 5211, and to the truth of which declarations or statements, Curtis, as cashier of that bank, made oath before a notary public within and for the county of St. Louis, in that State. These declarations or statements relate to the condition of the bank as to loans, discounts, checks, cash items, overdrafts, indi-

vidual deposits subject to checks, surplus fund, currency on deposit, and money due from that association to other National banks. The indictment contains five counts, which, as respects any matter now to be determined, do not substantially differ, except as to the several dates when the alleged oaths were taken. Those dates were July 18 and October 10, 1876, and January 15, January 26, and April 5, 1877.

The controlling question is as to the authority of the notary to administer the oaths, upon the falsity of which the indictment is laid.

It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of willfully false swearing. 1 Hawk. P. C., book 1, chap. 69, 321, § 4, p. 430 (8th Ed. by Curwood); Roscoe Crim Ev. (7th Am. Ed.) 817; 2 Whart. Crim. Law, § 1256; 2 Archb. Crim. Pr. & Pl. (8th Ed.) 1722. If therefore Curtis, at the time the several oaths alleged to be false were taken, was not authorized by the laws of the United States to take them before a notary public, he cannot be proceeded against under section 5392. The statute, in conformity with an established rule of criminal law, expressly declares that the oath must be taken before some "competent tribunal, officer, or person." This does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken, nor that the officer who administers it shall be an officer of that government. But the statute does mean that the oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. So that the underlying question is whether the notary public, whose commission is from the State, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths.

This question we are constrained to answer in the negative.

We are not aware of any act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment. The assistant attorney-general insists that such authority may be found in section 1778 of the Revised Statutes, which declares:

"In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may also be taken or made by or before any notary public duly appointed in any State, district, or territory, or any of the commissioners of the Circuit Courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

The authority of the notary to administer these oaths to Curtis cannot be derived from that section unless, at the dates in question they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers had no such authority by any Federal statute to which our attention has been called, or which we are able to find. Section 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the acts of September 16, 1850 (9 Stat. 458), July 29, 1854 (10 Stat. 315, § 1), and June 22, 1874 (18 Stat. 186, § 20). But nothing in these acts, even if they remained in force after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.

Counsel for the United States further insists that a proper construction of section 1778 will authorize a notary public in *any* State to administer oaths to officers of National banking associations when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this district. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective States the same authority in the administration of oaths as are given under the laws of the United States to justices of the peace in the same States, and to notaries public in this district the same authority in administering oaths which, under the laws of the United States, might be exercised by justices of the peace in this district. We have seen however that

justices of the peace in the several States had not been given such authority by any provision in the Revised Statutes, or by any act of Congress prior to their adoption. Nor can any support for the indictment be derived from the act of August 15, 1876 (19 Stat. 206), which declares "that notaries public of the several States, Territories, and the District of Columbia be, and they are hereby authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States Circuit Courts may now lawfully take or do."

The power of commissioners of the Circuit Courts did not, at the passage of that act, extend to the taking of oaths to reports by officers of National banks. They could take affidavits when required or allowed in any civil cause in a Circuit or District Court; R. S., § 945; act of February 20, 1812 (2 Stat. 679, § 1); act of March 1, 1817 (3 Stat. 350); or administer oaths where, in the same State, under the laws of the United States, oaths in like cases could be administered by justices of the peace; R. S. § 1778; or they could take evidence, affidavits and proof of debts in proceedings in bankruptcy; R. S., §§ 5003, 5076; acts of March 2, 1867 (14 Stat. 527), July 27, 1868 (15 Stat. 228, § 3), and June 25, 1874 (18 Stat. 186, § 20). But the authority of commissioners did not extend to such oaths as were administered to Curtis.

Our attention is called by counsel for the government to *United States* v. *Bailey*, 9 Pet. 238. That case, it is claimed, furnishes ample ground for an implication that the notary public who administered the oath in this case was fully empowered to do so. We do not so interpret that decision. That was an indictment for false swearing. It was based upon an act of Congress which provided that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for willful, corrupt perjury. The alleged false oath was administered before a justice of the peace for the Commonwealth of Kentucky. It was admitted that there was no statute of the United States expressly empowering a justice of the peace to ad-

minister the oath taken by Bailey. But the authority of that officer was sustained upon the ground that the Secretary of the Treasury had previously, and as incident to his duty and authority under an act of Congress, established a regulation permitting affidavits in support of claims against the United States to be made before justices of the peace. Except for that regulation the court, it is manifest, would not have sustained the indictment in *Bailey's Case.*

The conclusion, therefore, is not to be avoided, and it will accordingly be certified to the court below, that the alleged false oaths of the defendant were not taken before an officer, competent at the time under the laws of the United States, to administer them. The absence of such authority in notaries public seems to have been recognized by Congress when it passed the act of February 26, 1881 (21 Stat. 352), declaring "that the oath or affirmation required by section 5211 of the Revised Statutes, verifying the returns made by National banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification, as contemplated by said section 5211: provided, that the officer administering the oath is not an officer of the bank."

What has been said renders it unnecessary to consider any other question of law certified by the judges of the Circuit Court.

FIRST NATIONAL BANK OF XENIA v. STEWART.

(107 U. S. 676.)

ledge of bank's own shares as security — estoppel.

Where a National bank made a loan upon the pledge of its own shares and afterward sold the shares to obtain payment of the loan which exceeded the amount realized from the shares, *held*, that the owner of the shares could not, on the ground that the statute forbids a National bank to take its own shares as security, recover from the bank the amount realized upon the sale of the shares.

IN error to the Circuit Court of the United States for the Southern District of Ohio. The plaintiffs are administrators of the estate of Daniel McMillan, deceased, and the defendant is the First National Bank of Xenia, Ohio, a corporation formed under the National Bank Act of the United States. The action is brought to recover the sum of $4,200 with interest; the complaint alleging that in October, 1876, the bank was in possession of thirty shares of its capital stock belonging to the deceased; that it then unlawfully converted them to its own use and sold them, receiving therefor the sum mentioned, which it refuses to account for or deliver to the plaintiffs, although a demand for it has been made.

The bank, in answer to the complaint, avers that in April, 1876, the deceased was owing to it a debt previously contracted, greater in amount than the value of the shares of capital stock; that it being necessary to secure the bank from loss, he delivered to it certificates of the shares with other property, as collateral security for the debt; that in October, 1876, the debt being unsatisfied and overdue, the bank sold the shares at their full market value and applied the proceeds as a credit upon it; and that after such application a large amount remained due to the bank, which is still unpaid.

The evidence produced at the trial tended to show that the shares of stock were delivered by the deceased to the bank as collateral security for money loaned to him at the time and continued to be thus held until they were sold.

The court charged the jury that if they found from the evidence that the bank stock was delivered by the deceased to the bank as a pledge or collateral security for a loan of money made by him at the time, the plaintiffs were entitled to recover the amount of the proceeds, with interest from the time of sale; as the defendant was prohibited by the Currency Act from thus receiving its own stock.

To this charge the defendant excepted. The plaintiffs recovered a verdict, and to review the judgment entered thereon the case was brought to this court on writ of error.

FIELD, J. Section 5201 of the Revised Statutes declares that "No association shall make any loan or discount on the security of the shares of

its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of the purchase, be sold or disposed of at public or private sale, or in default thereof a receiver may be appointed to close up the business of the association."

While this section in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If therefore the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves.

There is another view of this case. The deceased authorized the bank in a certain contingency, to sell his shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. The administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased however the money loaned was an offset to the proceeds. In either view the administrators cannot recover.

The judgment of the court therefore must be reversed and the cause remanded for a new trial; and it is so ordered.

UNITED STATES v. BRITTON.

(108 U. S. 193.)

Criminal law — insolvent officer procuring discount of his own note — allowing debtor to withdraw his funds — willful misapplication of funds.

Where an insolvent officer of a National bank submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a willful misapplication of the funds of the bank under section 5209 U. S. Revised Statutes.

A count that charges that defendant, the president of a banking association, failed to apply certain funds standing to the credit of a debtor of such association to the payment of his indebtedness, and permitted such debtor to withdraw his funds from the association and transfer them to another bank, does not charge a criminal misapplication by defendant of the moneys and funds of the association.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

The first count charged that the defendant, James H. Britton, on March 24, 1877, within the Eastern District of Missouri, being the president and director of the National Bank of the State of Missouri, the same being a National banking association organized under the act of Congress, "did cause and procure to be then and there received and discounted by said association a certain promissory note, which said note was then and there in the words and figures following:

"$20,835. ST. LOUIS, *March* 24, 1877.

"Four months after date I promise to pay to the order of Geo. F. Britton, negotiable and payable at the National Bank of the State of Missouri, in St. Louis, twenty thousand eight hundred and thirty-five dollars, for value received, without defalcation or discount, with interest, after maturity, at the rate of ten per cent per annum. J. H. BRITTON."

— that the note was indorsed as follows: "Geo. F. Britton;" that the defendant converted to his own use the proceeds of the discount of said note, to-wit, the sum of $20,251.63; that said note, when so discounted, was not well secured; that said "James H. Britton, and the said payee and indorser of said note, to-wit,

one George F. Britton, were then and there insolvent, as he, the said James H. Britton, as president and director as aforesaid, then and there well knew;" and that said James H. Britton, by procuring said note to be discounted, and by applying the proceeds of said discount to his own use, willfully misapplied the said sum of $20,251.63 of the money and funds of said association, with intent then and there to defraud said association and certain persons to the grand jurors unknown.

The second count charged that on June 2, 1877, within the Eastern District of Missouri, one George F. Britton was indebted to said association in the sum of $79,480.23, as the maker of five promissory notes then unpaid; that said indebtedness of George F. Britton was known to James H. Britton, president and director of said association; that on said June 2, 1877, said notes were not well secured and said George F. Britton was insolvent, both of which facts said James H. Britton then well knew. Nevertheless, said James H. Britton, as president and director of said association, did then and there receive and discount a note for $800, dated June 2, 1877, due and payable on August 5, 1877, signed by the said George F. Britton as maker, and indorsed by him, the said James H. Britton, he being then insolvent, as he then well knew; that said James H. Britton did then and there pay out of the moneys and funds of said association, as the proceeds of said discount, to the said George F. Britton, the sum of $780.45, contrary to the form of the statute, etc.

The third count charged that on May 18, 1877, within the Eastern District of Missouri, said James H. Britton was president and a director of said banking association; that from April 12, 1873, to May 18, 1877, one Alfred M. Britton had been continuously indebted to said association in the sum of $37,122.67, as maker of a certain promissory note during said period, owned and held by said association, and was then indebted to said association for interest past due on said note in the further sum of $4,529.01; that said Alfred M. Britton was on said May 18, 1877, insolvent; that on the day and year last named there was in the moneys and funds of said association to the credit of said Alfred M. Britton the sum of $36.860.45; that said James H. Britton, well knowing the said indebtedness of Alfred M. Britton to said association and

his said insolvency, failed and neglected to cause to be applied to the said indebtedness of said Alfred M. Britton the said sum of $36,860.45, so as aforesaid in the moneys and funds of said association to the credit of said Alfred M. Britton, and did then and there willfully permit said Alfred M. Britton, while so indebted, to transfer and assign said sum of $36,860.45 to the credit of the City National Bank of Fort Worth, Texas. "And so the said James H. Britton did willfully misapply the said sum of $36,860.45 of the moneys of said association, with intent to injure and defraud said association and certain persons to the grand jurors unknown, contrary," etc.

Upon demurrer to the indictment the judges of the Circuit Court were divided in opinion upon the question whether the several counts charged with sufficient certainty an offense under section 5209 of the Revised Statutes. The case comes to this court upon this certificate of division.

Assistant Attorney-General Maury, for the United States.

J. B. Henderson, *George H. Shields* and *Chester H. Krum*, for defendants.

Woods, J. It is not alleged in the first count that the J. H. Britton, maker of the note discounted, was the James H. Britton who was president and a director of the association, and the defendant in the indictment, and consequently there is no averment that the maker of the note was insolvent. Passing by this defect, and assuming that the maker of the note is the defendant in this case, the *gravamen* of the charge is that defendant, being president and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured; the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question is therefore presented whether the procuring of the discount of such a note by an officer of the association is a willful misapplication of its moneys within the mean-

ing of the law. We are clearly of opinion that it is not. It is not even necessarily a fraud on the association.

One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly-authorized officers or agents. § 5136, R. S. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors, or other duly-authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of its discount.

But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, are immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution. The count under consideration charges nothing more than this against the defendant. We are of opinion therefore that it does not charge an offense under section 5209 of the Revised Statutes.

What we have said in reference to the first count of this indictment also applies in all respects to the second. We are therefore of opinion that it also does not charge an offense under section 5209.

In respect to the third count we observe that the statute (section 5130, clause 7) places the conduct of the business of banking associations with its board of directors, or its duly-authorized officers or agents. Section 5145 provides that the affairs of each banking association shall be managed by not less than five directors, to be chosen by the shareholders. It is alleged in this count that the defendant was the president and one of the directors of the association. But he was only one of at least five directors. The only duties imposed on him as president were to certify payments on the capital stock of the association (section 5140), to cause to be kept in the office where the business of the association was transacted a list of the shareholders (section 5210), and to verify by his oath the general reports made by the association to the Comptroller of the Currency (section 5211), and the reports of dividends declared (section 5212). It is nowhere averred in this count that the defendant was the duly-authorized officer or agent of the association, whose duty it was to look after the accounts of depositors, to apply the sums standing to their credit to the payment of their obligations to the association, or to prevent the withdrawal or transfer of their deposits while they continued indebted to the association, or that he was even charged with a general superintendence of the affairs of the association. Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the business of the association, the presumption is that it was the duty of the board of directors; and, if such was the fact, the defendant was powerless to prevent the transfer of the deposits of Alfred M. Britton to the credit of the City National Bank of Fort Worth. At all events, it is not charged that it was his duty to prevent such transfer, and this constitutes a fatal defect in the indictment.

But even if the defendant had been charged with the duty of looking after the deposits of debtors of the association and of applying their deposits to the payment of their debts, we do not

think that the fact that he permitted Alfred M. Britton while indebted to the association to withdraw and assign to the City National Bank of Fort Worth his deposit, would constitute a criminal misapplication by the defendant of the funds of the association.

The count charges neither application nor misapplication by the defendant of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of Alfred M. Britton to the payment of Britton's debt. It charges that he permitted Alfred M. Britton to do a perfectly lawful act, namely, to withdraw his own funds from the association and transfer them to another bank. This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association, or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly-penal statute beyond all reasonable limits.

In our judgment the count under consideration, as well as the first and second, is bad.

We therefore answer the first, third and fourth questions submitted to us by the judges of the Circuit Court in the negative.

United States v. Britton.

(108 U. S. 199.)

Conspiracy — procuring declaration of dividend — common-law offenses.

In an indictment for conspiracy under U. S. Revised Statutes, section 5440, the charge of conspiracy cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the conspiracy.

A conspiracy entered into between the directors of a banking association to misapply the moneys of the association by procuring the declaration by the association of a dividend greater than the net profits, in violation of section 5204 of the Revised Statutes, is not a criminal offense against the United States.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

Section 5440 of the Revised Statutes declares:

"If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000, and to imprisonment not more than two years."

Section 5209 of the Revised Statutes provides as follows:

"Every president, director, cashier, teller, clerk, or agent of any" banking "association who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association, * * * or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association, or any company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of such association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The defendants were indicted under section 5440 of the Revised Statutes. The indictment contained two counts. The first count charged, in substance, as follows: That Britton was the president and a director of the National Bank of the State of Missouri, in St. Louis, a National banking association organized under the act of Congress, and that Bates was vice-president and a director of the same association; that Britton and Bates, while president and vice-president respectively, and directors of said association, did conspire with each other to willfully misapply a large sum of money belonging to and the property of said association, to-wit: the sum of $87,500, by means of procuring to be made on June 30, 1876, by the said association, a dividend of three and one-half per centum on the capital stock of the association, which said dividend was to be greater, in the sum of $87,500, than the net profits of said association on hand after deducting from said net profits the amount of the losses and bad debts of the association existing on said 30th day of June.

The acts done to effect the object of the conspiracy were, in substance, alleged as follows: That Britton falsely represented to one Walsh, who on June 30, 1876, was also a director of the association, that the net profits of the association were on that day sufficient in amount to warrant and permit the declaration of said dividend, and did thereby induce the said Walsh to assent to the declaration of said dividend, and to join on said June 30th, as

such director, with Britton and Bates, directors as aforesaid, in the declaration of said dividend, they, the said Britton, Bates and Walsh, constituting a majority in number of the directors of said association; that to effect the object of said conspiracy, Britton did further, upon the said June 30th, cause and procure to be made by one Edward P. Curtis, in the record of the proceedings of the board of directors of said association, the following entry: "St. Louis, June, 30, 1876. Present, Messrs. Britton and Walsh; Mr. Bates assenting on the 29th. Ordered, that a division of three and one-half per cent be declared payable on the tenth proximo, and that the transfer books be closed till that date. Attest, Edward P. Curtis, cashier;" that afterward, on July 8, 1876, in further pursuance of and to effect the object of said conspiracy, the said Britton and Bates did each receive from said association, and convert to his own use, a large sum of money — the said Britton the sum of $5,397, and the said Bates the sum of $4,112.

The second count was similar to the first, except that after averring that said dividend so to be declared on said June 30, 1876, was known to be false and fraudulent, it was added that there was on said June 30, 1876, due and owing to said association certain debts, specifying them, amounting in the aggregate to the sum of $797,214.29; that upon such debts there was owing to the association, then past due and unpaid, interest for a period of six months; that said debts were "not well secured and in process of collection," and their aggregate amount was largely in excess of the net profits and purported net profits of said association then on hand, as said Britton and Bates then well knew; and that said debts were bad debts within the meaning of section 5204 of the Revised Statutes, as said Britton and Bates then well knew.

The defendants demurred to the indictment. Upon the hearing of the demurrer, the judges of the Circuit Court were divided in opinion upon the following questions:

(1.) Whether under section 5209 of the Revised Statutes of the United States, it was necessary to aver that the alleged conspiracy was entered into with intent to injure and defraud; and whether the several counts in this indictment not containing the said allegations are good and sufficient in law.

(2.) Whether it was necessary in this indictment, in addition to the allegations charging the conspiracy to willfully misapply certain funds and property

of the association, by means of procuring to be made by the board of directors a dividend, as alleged in the indictment, to further allege that said dividend was in pursuance of said conspiracy declared and made; and, if so, whether the same is sufficiently charged therein, and whether it is also necessary to allege that said dividend was fraudulent when declared and also when paid.

(3.) Whether, under section 5209 of the Revised Statutes of the United States, it was necessary in this indictment to charge that the funds alleged to have been misapplied had been previously intrusted to the possession of the defendants.

(4.) Whether the indictment in this case alleges with sufficient certainty that the bank had no net profits out of which to declare and pay the dividend alleged to have been fraudulent.

(5.) Whether the said defendants, as directors of the said banking association, are liable to the penalties provided by the said section 5209, upon proof that they, as such directors, willfully voted for the declaration of a dividend, knowing that there were no net profits out of which to pay the same; and, if liable, must the indictment charge that such dividend was ordered or voted for with intent thereby to defraud the association or other persons.

Assistant Attorney-General Maury, for the United States.

S. T. Glover, *J. R. Shepley*, and *Chester H. Krum*, for Britton and Bates.

Woods, J. The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus pœnitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King*, 7 Q. B. 782; *Com.* v. *Shedd*, 7 Cush. 514.

The charge against the defendants is a conspiracy to willfully misapply the funds of the association. It is alleged in the counts of this indictment that they, being directors, with intent to defraud the association, did conspire to willfully misapply its moneys and funds by procuring to be declared by the association a divi-

dend of its net profits, when there were no net profits sufficient in amount to pay it.

Such a dividend is forbidden by section 5204 of the Revised Statutes, which declares as follows:

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained equal to or exceeding its undivided profits then on hand no dividend shall be made, and no dividend shall ever be made by any association while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section."

We are therefore to inquire whether the conspiracy entered into by him and between the defendants to misapply the moneys of the association by procuring the declaration by the association of a dividend greater than the net profits of the association is a criminal offense against the United States. There are no common-law offenses against the United States (*U. S.* v. *Hudson*, 7 Cranch, 32; *U. S.* v. *Coolidge*, 1 Wheat. 415), and section 5204 does not of itself create any offense against the United States. But it is contended on behalf of the United States that the procuring of a dividend to be declared by the association when there are no net profits to pay it is a willful misapplication of the moneys and funds of the association, which is made an offense by section 5209 of the Revised Statutes, and that a conspiracy to commit this offense is made punishable by section 5440. We think this construction of the statute is unwarranted, and that the indictment is based on a misconception of its provisions.

The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely, by procuring to be declared by the association a dividend when there were no net profits to pay it. If procuring the declaring of such a dividend by the association is not a willful misapplication of its funds by these defendants, then the indictment charges no offense. The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an

officer of the association in his official and not in his individual capacity. It is therefore an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. The act belongs to the same class as the purchase by a banking association of its own shares when not necessary to prevent a loss on a debt due it, which, in case No. 406, just decided,* we held not to be a criminal misapplication of the funds of the association. If therefore the indictment had charged that the defendants had misapplied the funds of the association by themselves declaring a dividend, when there were no net profits to pay it, it would not have charged a criminal act, much less when it merely charges that they conspired to procure the association to declare a dividend under like circumstances. So that it appears on the face of the indictment that the conspiracy charged was not a conspiracy to commit an offense against the United States.

We therefore answer the first branch of the fifth question propounded to us by the judges of the Circuit Court in the negative.

Our opinion is that under this indictment the defendants are not "liable to the penalties provided by section 5209, upon proof that they, as such directors, willfully voted for the declaration of a dividend, knowing there were no net profits out of which to pay the same," because this is not the offense with which they are charged in the indictment. And as they are charged with a conspiracy to do an act which is not an offense, we are of opinion that no penalties could be inflicted on them under the indictment.

As the answer we have given to this question is fatal to the indictment, it is not necessary for us to answer the other questions sent to us by the judges of the Circuit Court.

As to what are "net profits," see 1 Am. St. Rep. 342, note; 119 U. S. 296; 16 Ch. Div. 344.

* United States v. Britton, *ante*, 76.

Moores v. Citizens' National Bank of Piqua, Ohio.*

(111 U. S. 156.)

Collateral security — fraudulent certificate of stock in National bank — action against bank.

A. lent money to B. for his own use on B's. false representation that he owned and had transferred to A. a certificate of stock to an equal amount in a National bank of which B. was cashier, and received from him such a certificate, written by him in one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, certifying that A. was the owner of that amount of stock, "transferable only on the books of the bank on the surrender of this certificate," according to its by laws. B. did not deliver any certificate to the bank, or make any transfer to A. upon its books. He never repaid the loan and was insolvent. The bank did not ratify or receive any benefit from the transaction. *Held*, that A. could not maintain an action against the bank to recover the value of the certificate. *Held*, also, that the action could not be maintained by mere evidence of one or two other similar instances of issues of stock by B. without the surrender of any certificate, and that shares once owned by B. and pledged by him to other persons before the issue of the certificate to A., were afterward transferred to the president, with the approval of the directors, to secure a debt due from B. to the bank.

IN error to the Circuit Court of the United States for the Southern District of Ohio.

E. W. Kittredge and *J. W. Warrington*, for plaintiff in error.

Wm. M. Ramsey and *E. M. Johnston*, for defendant in error.

Gray, J. This is an action against a National bank to recover the value of a certificate of stock therein, which the bank had refused to recognize as valid. The amended petition and other pleadings are stated in the report of the case at a former stage, at which this court, for an erroneous ruling of the Circuit Court on a question of the statute of limitations, reversed a judgment for the defendant, and ordered a new trial. 104 U. S. 625. A recital of the pleadings is unnecessary to the understanding of the case as now presented. The undisputed facts, as appearing by

* Affirming 15 Fed. Rep'r, 141.

the admissions in the petition, by the evidence introduced by the plaintiff before the jury at the new trial, and by the defendant's admission at that trial, were as follows:

The defendant was organized in 1864, under the act of Congress of June 3, 1864 (chap. 106), the twelfth section of which provides that the capital stock shall be "transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of association." 13 St. 99, 102. The defendant's by-laws relating to transfers of stock were as follows:

"SEC. 15. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer-book shall be kept, in which all assignments and transfers of stock shall be made. No transfer of the stock of this association shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends; and, except in cases of agreement to the contrary, expressed in the assignment, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"SEC. 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and canceled, and new certificates issued."

The defendant's capital stock was one thousand shares of $100 each, the whole of which was in fact, and was alleged in the petition to have been taken and paid for, and certificates therefor issued to the stockholders, at the time of its organization in 1864. The president and cashier of the bank were charged with the keeping of its transfer-books and the issuing of certificates of stock, and the books of the bank were always open to the inspection of the directors. On July 15, 1867, G. Volney Dorsey was president and Robert B. Moores was cashier of the bank, and said Moores, who had previously owned two hundred and seventy-five shares of the stock, appeared on the books of the bank to be still the owner thereof. He and John B. C. Moores, the plaintiff's husband, were sons of William B. Moores. On that day, the plaintiff agreed to lend $9,100 of her own money to Robert and William for use in their private business; they agreed to give her, as security for its repayment, a certificate of ninety-one shares, which Robert repre-

sented to her that he owned, and also the contract of guaranty, hereinafter set forth; and Robert sent to the plaintiff's husband, as her agent, the following letter and certificate:

"CITIZENS' NATIONAL BANK OF PIQUA,
"PIQUA, O., *July* 15, 1867.

"JOHN: Herewith I hand you the stock transferred to Carrie. I don't know what day I will be down, and you can keep the contract there, and I will sign it the first time I am down. I will have to take a receipt for the stock from father, to file with my papers, to show where the stock is gone to. All well; may be down any day.

"Y'rs, R. B. MOORES."

"THE CITIZENS' NATIONAL BANK OF PIQUA.

"No. 56. STATE OF OHIO. 91 Shares.

"This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock of the Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

"PIQUA, O., *July* 15, 1867. [Seal.]

"ROB'T B. MOORES, *Cashier*. G. VOLNEY DORSEY, *President*."

This certificate was in the usual form of printed certificates used by the bank, and bore the genuine seal of the corporation, and the genuine signatures of the president and cashier; and the whole certificate, except the printed part and the president's signature, was in the cashier's handwriting, filled up by him in one of two or three blanks signed by the president and left with him to be used if needed in the president's absence.

Upon receiving the letter and certificate, the plaintiff paid the money to Robert B. Moores; and on July 18th he and William signed and sent to her the following contract:

"For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores ninety-one shares of stock of the Citizens' National Bank, of Piqua, Ohio.

"Now it is agreed that the said Caroline A. Moores shall, upon demand by Robert B. Moores, or his assigns, reassign to said R. B. Moores the said stock for the same amount. And it is also agreed that whenever the said Caroline A. Moores shall require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash. And in the meantime it is agreed, and the said Robert B. Moores and William B. Moores do hereby guaranty and assure to said Caroline A. Moores an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars, which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a year, and all

deficiencies in said dividends shall be made good at the time of such repurchase or transfer to R. B. Moores.

"In witness whereof, the said Caroline A. Moores and J. B. C. Moores, her husband, and Robert B. Moores and William B. Moores, hereunto set their hands on this 15th day of July, 1867.

"CAROLINE A. MOORES.
"J. B. C. MOORES.
"ROBT. B. MOORES.
"W. B. MOORES."

Robert B. Moores surrendered no certificate to the bank, and made no transfer to the plaintiff on its books. The plaintiff had no other knowledge of the rule requiring the surrender of an old certificate of stock before the issue of a new one, or of any fraud on the part of Robert, than was obtained by her reading and possession of the certificate. The value of the stock of the bank at that time was ninety per cent of its par value. Robert B. Moores was insolvent, and the money sent to him by the plaintiff was never repaid.

The plaintiff put in evidence two letters to her husband from Dorsey, the president of the bank, — one dated June 25, 1872, stating that the writer had just learned that he held a certificate of stock purporting to be issued by the bank, and asking for its number, date and amount; and the other dated July 5, 1872, the body of which was as follows:

"There is no such certificate as mentioned in yours of June 27th on our books. No. 56 is marked on the stub in our certificate book 'destroyed' in R. B. Moores' handwriting. Your wife's name was never entered among our stockholders, and the certificate is a fraud. We never heard of this certificate until you mentioned it to Dr. Parker, who first informed me of it."

Robert B. Moores and Dorsey, being called as witnesses for the defendant, testified that it had no interest in the transaction of July 15, 1867. Moores testified that at that date he had pledged to Jason Evans and other persons all the stock he had previously owned, and did not own any stock; and that he issued the certificate to the plaintiff without any authority from the bank, or any knowledge of the other officers. Dorsey testified that he had no knowledge of the issue of the certificate until June 25, 1872, and that the bank never paid any dividends upon it; and he produced the certificate book of the bank, which showed the stub of a certificate, in its regular order, corresponding in number

with that produced by the plaintiff, and having the word "destroyed" upon it in the handwriting of Robert B. Moores.

The plaintiff offered in evidence, and the court declined to admit the record of a meeting of the board of directors of the bank, on August 9, 1869, containing the following entry:

"On motion, the following resolution was adopted and ordered to be placed upon the minutes: Whereas, Robert B. Moores, who was the owner of 275 shares of the capital stock of this bank,—evidenced by certificate No. forty-seven (47) for fifty shares, dated May 2, 1867; certificate No forty-eight (48) for fifty shares, dated May 2, 1867; certificate No. forty-nine (49) for sixty-five shares, dated May 2, 1867; certificate No. fifty-three (53) for seventy shares. dated June 11, 1867; and certificate No. fifty-four (54) for forty shares, dated June 11, 1867,— became indebted to this bank in the sum of thirty-seven thousand two hundred and forty-seven 29-100 dollars, ($37,247.29), and did, on the sixteenth day of January, 1868, transfer one hundred and eighty-five shares of said stock, and on the fifteenth day of May, 1869, did transfer ten shares of said stock, on the books of this bank, to G. Volney Dorsey, in consideration that said G. Volney Dorsey pay to this bank the sum of nineteen thousand five hundred dollars of said indebtedness; and whereas, Jason Evans, who became the holder of seventy shares of said stock, issued as aforesaid, and transferred to him by the said R. B. Moores on the books of this bank, September 4, 1867, as per certificate No. 59, did, on the twentieth day of February, 1869, transfer to G. Volney Dorsey, on the books of this bank, by his power of attorney, all his right, title, and interest in the same; therefore said transfers, as hereinbefore stated, are approved and affirmed by the directors of this bank."

The plaintiff also offered evidence that there were one or two other instances in which stock was issued by the cashier without any certificate being surrendered. But as she offered no evidence, other than the directors' record of August 9, 1869, that the other officers of the bank had any knowledge at the time of such transactions, or subsequently recognized them, the court excluded the evidence. The plaintiff offered to prove that there was an arrangement between Robert and her husband, by which interest, equal to ten per cent on $9,100, on a debt due from the latter to his father, was to be treated as dividends upon this stock. But the court excluded the evidence as immaterial.

The court instructed the jury that the plaintiff, having knowledge of the fact that Robert B. Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier, in reference to the matter of issuing this certificate, she was not an innocent holder of the stock,

and as the certificate was issued without authority, in fraud of the rights of the bank, they should return a verdict for the defendant. A verdict was returned accordingly, and judgment rendered thereon, and the plaintiff excepted to the exclusion of evidence and to this instruction, and sued out this writ of error.

The petition alleges that the false and fraudulent representations made by Robert B. Moores, and relied on by the plaintiff, that he had assigned and transferred the stock in question to her on the books of the bank, were made by him both as cashier and as stockholder; that the bank afterward fraudulently permitted and procured him to transfer all the stock owned by him, or standing in his name to its president, for its benefit; that the bank through its cashier, fraudulently concealed from her the facts that no transfer had been made to her on its books at the time of the issue and delivery of the certificate to her; that the certificate was not authorized or recognized as valid by the bank; and that the stock standing in his name had been transferred on its books to its president; and concludes by alleging that by reason of such fraudulent conduct and acts of the bank the certificate was invalid and worthless in her hands. But the evidence offered at the trial does not support the allegations of fraudulent conduct on the part of the bank.

The petition alleges "that the plaintiff relied upon the representations of said Robert B. Moores, as cashier and officer of the defendant, that the said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank; and said plaintiff relied upon said certificate of stock which she received as genuine and valid for what it purported to be." And at the trial the plaintiff relied upon the representations made to her by Robert B. Moores, orally and in the letter inclosing the certificate, and in his contract of guaranty, as well as upon those arising out of the certificate itself. The two may be conveniently considered separately.

His representations outside of the certificate may be first disposed of. The plaintiff dealt with Robert B. Moores, and not with the bank. Her agreement was with him personally, and she lent her money to him for his private use. His representations to her that he owned stock in the bank, and that such stock

had been transferred to her, were representations made by him personally, and not as cashier; and there is no evidence that the plaintiff understood or had any reason to understand, that those representations were made by him in behalf of the bank. The duty of transferring his stock to the plaintiff before taking out a new certificate in her name was a duty that he, and not the bank, owed to the plaintiff. The making of such a transfer was an act to be done by him in his own behalf as between him and the plaintiff, and in the plaintiff's behalf as between her and the bank. There is nothing therefore in his extrinsic representations for which the bank is responsible.

The certificate which he delivered to the plaintiff was not in his name, but in hers, stating that she was entitled to so much stock, and showed upon its face that no certificate could be lawfully issued without the surrender of a former certificate, and a transfer thereof upon the books of the bank. The by-laws passed under the authority expressly conferred by the act of Congress, under which the bank was organized, contained a corresponding provision, designed for the security of the bank, as well as of persons taking legal transfers of stock without notice of any prior equitable title therein. *Union Bank* v. *Laird*, 2 Wheat. 390; *Black* v. *Zacharie*, 3 How. 483, 513. The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were pre-requisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal pre-requisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been com-

plied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity.

Of the great number of cases referred to in the thorough and elaborate arguments at the bar, we shall notice only some of the most important. None of those cited by the learned counsel for the plaintiff affirm a broader proposition than this: A certificate of stock in a corporation, under the corporate seal, and signed by the officers authorized to issue certificates, estops the corporation to deny its validity, as against one who takes it for value and with no knowledge or notice of any fact tending to show that it has been irregularly issued.

When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be executed by the rightful owner, issues a new certificate to the present holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Midland Ry.* v. *Taylor*, 8 H. L. Cas. 751; *Bank* v. *Lanier*, 11 Wall. 369; 1 Nat. Bank Cas. 70; *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; *Pratt* v. *Boston & A. R.*, 126 id. 443. And the corporation is obliged if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation. *In re Bahia & S. F. Ry.*, L. R., 3 Q. B. 584. Whether before the last sale has taken place, the corporation is liable to the holder of the new certificate, is a question upon which there appears to have been a difference of opinion in England. According to the decision of Lord NORTHINGTON in *Ashby* v. *Blackwell*, 2 Eden, 299; s. c., Ambler, 503, it would seem that the corporation would be liable. According to the decisions of Sir JOSEPH JEKYLL in *Hildyard* v. *South Sea Co.*, 2 P. Wms. 76, and of the Court of Appeal in *Simm* v. *Anglo-American Tel. Co.*, 5 Q. B. Div. 188, it would seem that it would not, because the holder of the new certificate

takes it, not on the faith of that or any other certificate of the corporation but on the faith of the forged power of attorney. However that may be, it is clear that the corporation is not liable to any one taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified or received some benefit from the transaction.

In *Hart* v. *Frontino Mining Co.*, L. R., 5 Exch. 111, the plaintiff, a *bona fide* purchaser of the shares, had paid assessments thereon to the company upon the faith of the certificate issued by it to him after his purchase. In *Barwick* v. *English Joint-stock Bank*, L. R., 2 Exch. 259, and in *Mackay* v. *Com. Bank*, L. R., 5 P. C. 394, the bank had derived a benefit from the fraud of its agent, and was held liable upon that ground. The decision in *Swift* v. *Winterbotham*, L. R., 8 Q. B. 244, that a bank was liable upon its official manager's representation to one of its customers that the credit of a certain person was good, was reversed in the Exchequer Chamber. *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301. The decision in the Exchequer Chamber in *The Queen* v. *Shropshire Ry.*, L. R., 8 Q. B. 420, that a railway company, owning shares of its own stock, the legal title of which was registered in the name of one of its directors as trustee for the corporation, should transfer them to a person who, believing the director to be the absolute owner of the shares, had lent him money on the deposit of the certificate as security, was contrary to the judgment of the Court of Queen's Bench, and was reversed in the House of Lords. L. R., 7 H. L. 496.

The American cases on which the plaintiff principally relies are decisions in the courts of Connecticut, New York, Pennsylvania and Maryland, the soundness of some of which we are not prepared to affirm, but all of which are distinguishable from the case at bar.

The leading cases in Connecticut and New York arose out of what have been known as the Schuyler frauds. Robert Schuyler, the president and general transfer agent of the New York and New Haven Railroad Company, issued, beyond the capital limited by its charter, but in the form prescribed by its by-laws, purporting to be transferable on its books on surrender of the certificates, a

large amount of certificates of stock, annexed to which were printed forms of assignment and power of attorney.

In *Bridgeport Bank* v. *New York & N. H. R. R.*, 30 Conn. 231, a bank which had received as collateral security for money lent to a firm of which Schuyler was a member, certificates of stock so issued by him, was held entitled to maintain an action against the corporation for the value of these certificates, upon the single ground that it was admitted that when the plaintiff took these certificates the firm held more than an equal amount of genuine certificates.

In *New York & N. H. R. R.* v. *Schuyler*, 34 N. Y. 30, it appeared that Schuyler had issued, in one and the same form, large numbers of genuine as well as of false certificates, and had raised on both indiscriminately, large amounts of money, which had been applied for the benefit of the corporation; that all his transactions appeared on its books; and that the directors had for years been guilty of negligence, in not making any examination of the books, or of the conduct of the transfer office; and none of the purchasers of the false certificates, for the value of which the corporation was held to be liable, had any notice, or means of knowing, that they were not such as Schuyler was authorized to issue.

In *Titus* v. *Great Western Turnpike*, 61 N. Y. 237, the certificates upon which the corporation was held liable, stated the stock to be owned by the person who, as officer of the corporation, issued them, not by the person to whom they were issued, and the latter had no notice of any fraud or irregularity in the issue.

In the other New York cases cited for the plaintiff, the certificates had been purchased in good faith in the market. *Bruff* v. *Mali*, 36 N. Y. 200; *McNeil* v. *Tenth Nat. Bank*, 46 id. 325; 7 Am. Rep. 341; *Moore* v. *Metropolitan Bank*, 55 N. Y. 41; 14 Am. Rep. 173; *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616. See *Merchants' Bank* v. *Livingston*, 74 id. 223.

In *Kentucky Bank* v. *Schuylkill Bank*, 1 Pars. 180, the certificates upon which the corporation was held to be liable were in the hands of innocent purchasers, without notice. The opinion in *People's Bank* v. *Kurtz*, 99 Penn. St. 344, 349; 44 Am. Rep. 112, goes no further. On the other hand, in *Wright's Appeal*, 99 Penn. St. 425, where the president of a bank, having no au-

thority to borrow money in its behalf, induced his aunt, a stockholder therein, to surrender to him her certificates of shares with blank powers of attorney, by means of false and fraudulent representations that they were needed to aid the bank; gave her his own note therefor, sold the stock, and applied the proceeds to his own use; and afterward, by a fraudulent combination with the other officers of the bank, issued stock in excess of the lawful limit, and gave her new certificates for those that he had obtained from her — it was held that he was her agent in the original transaction, and that as she gave no value to the bank for the new certificates, the loss must fall upon her, and not upon the bank.

In *Tome* v. *Parkersburg R.*, 39 Md. 36; 17 Am. Rep. 540, there was no by-law requiring a surrender and transfer of old certificates before the issue of new ones, and no limit of the amount of stock to be issued, and it was not contended that there had been any overissue, or that the plaintiff had any notice of fraud or want of authority in the officers of the corporation.

In *Western Maryland R.* v. *Franklin Bank*, 60 Md. 36, the certificates were not issued to the plaintiff, but bought in the market, without any notice of their having been fraudulently or illegally issued.

In *Hackensack Water Co.* v. *De Kay*, to which the plaintiff has referred us, the Court of Errors of New Jersey said: "Indeed, as is apparent from all the cases cited, the doctrine which validates securities within the apparent powers of the corporation but improperly, and therefore illegally, issued, applies only in favor of *bona fide* holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security." 9 Stew. (N. J.) 548, 565.

The general doctrine was stated with like limitations by this court in the case of *Merchants' Bank* v. *State Bank:* "Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation,

and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists." 10 Wall. 604, 644.

This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier.

The exceptions to the exclusion of evidence cannot be sustained. The evidence that in one or two other instances stock was issued by the cashier without the surrender of old certificates, and that the directors of the bank approved certain transfers to its president of shares once belonging to the cashier, was quite insufficient to prove that the bank ratified or received any benefit from the issue of the certificate to the plaintiff, or was guilty of any fraud toward her. The action of the directors was adapted to the single purpose of securing payment of a debt due from the cashier to the bank. The evidence introduced and offered being insufficient to support a verdict for the plaintiff, the Circuit Court rightly directed the jury to return a verdict for the defendant. *Randall* v. *Baltimore & O. R.*, 109 U. S. 478.

Judgment affirmed.

BRADLEY, J., dissented.

MATTHEWS, J., having been of counsel, did not sit in this case or take any part in its decision.

Anderson v. Philadelphia Warehouse Co.

(111 U. S. 479.)

Stockholders — liability of pledgee

In the absence of actual fraud or bad faith, the mere pledgee of stock of a National bank is not chargeable as a stockholder, in the event of its failure, where he is not registered as owner.

IN error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Preston K. Erdman and *Edward Harvey*, for plaintiff in error.

R. C. McMurtree and *Geo. Junkin*, for defendant in error.

Waite, C. J. This suit was brought by the receiver of the First National Bank of Allentown, an insolvent National bank, to recover an assessment made by the Comptroller of the Currency on the shareholders to pay debts, and the only question presented for determination is whether, upon the facts, the Philadelphia Warehouse Company was in law a shareholder of the bank at the time of its failure, and as such liable to creditors. The facts, as shown by the undisputed testimony or found by the jury, are these:

From the 17th of April, 1864, until December 27, 1871, William Kern was the registered holder of four hundred and ninety shares of the stock of the bank. Kern was one of the partners in the banking and business firm of W. H. Blumer & Co., composed of himself, William H. Blumer, and Jesse Line. Blumer was the president of the bank, and the other two partners in the firm directors. A son of the president was cashier and also a director. In the latter part of the year 1871 Blumer & Co., through William H. Blumer, arranged with the Philadelphia Warehouse Company, in Philadelphia, for a loan or banker's credit, to be secured by a deposit of collaterals. The account was opened and the first drafts paid upon a deposit of gas stocks as security. On the 27th of December, 1871, Kern transferred

four hundred and fifty of the shares of the stock standing in his name on the books of the bank, and had a new certificate issued in the name of T. Charlton Henry, president. This certificate was receipted to the bank by Blumer, its president, and by him either taken or sent to the warehouse company as further security for the credit extended to Blumer & Co. The certificate came into the hands of Henry, the president of the company, on the 28th of December, and soon after another draft of Blumer & Co. for $10,000 was paid. On or before the 2d of January the fact of the transfer of the stock to the name of Henry, president, was brought to the attention of some of the directors and members of the executive committee of the warehouse company. At once it was deemed inadvisable to have the stock stand in the name of the president, and the certificate was, on the 3d of January, transferred, under the seal of the company and the signatures of its president and secretary to Dennis McCloskey, an irresponsible person, and a porter in its employ. The certificate with the transfer upon it was sent the same day by the secretary of the company to Blumer & Co., with a request that the stock might be transferred and a new certificate issued in the name of McCloskey, and returned. To this request Blumer replied as follows:

"WM. H. BLUMER, President. J. A. BLUMER, Cashier.
"THE FIRST NATIONAL BANK OF ALLENTOWN.
"ALLENTOWN, PENN'A, *January* 4, 1872.

"T. CHARLTON HENRY, Esq., *President:* To-day I received one remittance from your L. S. Maderia, to-wit, certificate of stock for four hundred and fifty shares of the capital stock of the First National Bank of Allentown, with a request to assign the same and make a new certificate to Dennis McCloskey. I do not understand the nature of this transaction, and would respectfully ask you to give me explanation why the stock is to be transferred to a third party; and if it would be better to place other securities with you, such as gas stock, in cases where you pledge them with outsiders.

"If my remarks seem improper pardon me, for I only ask questions to gain wisdom. Very respectfully,
"WM. H. BLUMER,
"For W. H. BLUMER & Co."

To this letter the company sent the following answer:

"*January* 6, 1872.

"WM. H. BLUMER, Esq., *Pres't*—DEAR SIR: I am in receipt of your favor of the fourth inst., and in reply would say that I am not surprised at your in-

quiry, since you were requested to have the certificate made out in my name. We have no need to borrow any money, nor do we expect or intend to put this stock out of our hands, but the failure of one or two National banks lately led our directors to consider the clause in the National Bank Act which renders all stockholders liable in case of failure, to pay up to the receiver the full amount of the stock in their name; and on this account we determine to have the certificates of National bank stock put in the name of Dennis McCloskey, who is the boy in our office, taking his power of attorney to transfer the same. Hoping this explanation will prove satisfactory,

"I am yours, respectfully,

T. C. HENRY, *Pres't*.

Upon the receipt of this letter, the stock was transferred in due form January 10th to McCloskey, on the books of the bank, and a new certificate issued in his name. This certificate was receipted for McCloskey by W. H. Blumer, and forwarded to the warehouse company as an inclosure in the following letter:

"OFFICE OF THE ALLENTOWN GAS COMPANY.

"W. H. BLUMER, President. J. M. LINE, Treasurer.

"ALLENTOWN, PA., *January* 10, 1872.

"T. C. HENRY, Esq.—DEAR SIR: Inclosed I hand you certificate of 450 shares First National Bank of Allentown. It is never out of the way if you are cautious, but in this case I presume there would have been no danger. I would not sell the gas stock for $50,000. Truly,

"W. H. BLUMER."

McCloskey never had possession of the certificate, and at the request of the warehouse company executed in blank, as of the date of January 3d, an irrevocable power of attorney for the sale and transfer of the stock. He died in 1875. After his death the stock was transferred on the books of the bank, at the request of the company, to Francis Ferris, another employee and also an irresponsible person. This certificate was delivered to the company, and Ferris indorsed thereon an irrevocable power of attorney for its transfer. The stock stood in his name at the time of the failure of the bank in 1878, the company holding the certificate. Dividends were paid regularly on this stock to Kern or Blumer & Co. from the time of the original transfer up to and including December, 1876. The warehouse company never received any dividends and never acted as a shareholder. Blumer & Co. failed in 1877, largely indebted to the warehouse company, which still held as security the stock standing in the name of Ferris. The failure of Blumer & Co. crippled the bank so that

it never afterward paid a dividend, and on the 15th of April, 1878, it was put into insolvency by the Comptroller of the Currency and a receiver appointed. On the 10th of May following the Comptroller assessed the shareholders twenty per cent of the par value of their shares to pay the debts, and this suit was brought to collect that assessment on the four hundred and fifty shares in question. The jury under instructions applicable to the foregoing state of facts, rendered a verdict for the defendant, and to reverse a judgment on that verdict this writ of error was taken.

It is well settled that one who allows himself to appear on the books of a National bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that if a registered owner, acting in bad faith, transfers his stock in a failing bank, to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. *Nat. Bank* v. *Case*, 99 U. S. 628; 2 Nat. Bank Cas. 25; *Bowden* v. *Johnson*, 107 U. S. 251, *ante*. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person, may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner.

There is in this case no evidence of actual fraud or bad faith. The warehouse company never was the owner of the stock in question, and never held itself out as such. The transfer of Kern and Blumer & Co. was only by way of pledge, and the company was bound to return the stock whenever the debt for which it was held should be paid. From the verdict of the jury, under the instructions of the court, it must also be accepted as a fact that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and it is undisputed that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock had been standing, with the assent of Kern, Blumer & Co., and the officers of the bank, in the name of McCloskey or Ferris. During all that time, neither the registered holders nor the warehouse company claimed dividends or in any way acted as shareholders. On the contrary, either Kern or

Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock. There was no concealment on the part of the warehouse company, and no effort to deceive. It had possession of the certificates which represented the stock, with full power to control them for all the purposes of its security, but there was never a time, from the date of the original transfer by Kern on the books, until the failure of the bank, that it was or pretended to be any thing else than a mere pledgee. Those who examined the list of shareholders would have found the name of McCloskey or of Ferris as the registered holder of four hundred and fifty shares. There was nothing on the books of the bank to connect them, or either of them, with the warehouse company, and therefore no credit could have been given on account of the apparent liability of the company as a shareholder. If inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee, without making itself liable as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the warehouse company, Blumer & Co. or Kern were owners of the stock and the company the pledgee. As between the company and the bank or its creditors, the company was a pledgee of the stock and

liable only as such. The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co., who were always the real owners.

To our minds the fact that the stock stood registered in the name of Henry, president, from December 27 to January 10, is, under the circumstances of this case, of no importance. The warehouse company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, president, or if Henry had re-transferred to Kern or Blumer & Co., and they had, at the request of the company, made another transfer to McCloskey. The security of the warehouse company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun.

It follows that the judgment of the Circuit Court was right, and it is consequently affirmed.

MILLER, J., *dissenting*. I do not concur in this judgment. I think if in any case between private persons, one of them had placed property in the hands of minors, servants, or other irresponsible persons, for the purpose of escaping the responsibility attaching to the ownership of such property, while securing all the advantages of such ownership, it would be held to be a transaction which could not be supported on any legal or equitable principle. It does not remove this case from the control of that principle, that the parties to be injured are the unknown creditors of the bank, who are, by this means, deprived of the right which they have to resort to a responsible shareholder for the contribution which the law gives for their benefit. If not an actual fraud, it is a fraud

upon the banking law, and was so intended to be by both the original holders of the bank shares and the officers of the warehouse company, by which the latter could control the shares without the responsibility which the law attaches to the owner. It is an easy device to make the right which the law gives to creditors of a failing bank ineffectual, and to evade it in all cases.

MATTHEWS, J., agrees with me in this dissent.

Judgment affirmed.

UNITED STATES, EX REL. WHITE, v. KNOX.

(111 U. S. 784.)

Insolvency — payment of creditors by Comptroller — adjudicated claims — amount, how determined.

The payment of a creditor of an insolvent National bank by the Comptroller, under section 5236, U. S. Revised Statutes, must be based on the amount due on the adjudicated claim at the date of the failure, and not on the amount due when the claim is adjudicated.

IN error to the Supreme Court of the District of Columbia.

S. V. White, for plaintiff in error.

Nath. Wilson, for defendant in error.

WAITE, C. J. This was a suit for *mandamus* to compel the Comptroller of the Currency to pay a dividend on a debt of the Miners' National Bank of Georgetown, Colorado, an insolvent National bank. The question argued in this court arises on the following facts: The Miners' National Bank of Georgetown was put into insolvency by the Comptroller of the Currency, and a receiver appointed about the 20th of December, 1875. It owed a large amount of debts, and among the rest about $60,000 to White, the relator, which the Comptroller refused to allow. White thereupon brought suit to have his claim adjudicated, and on the 23d of June, 1883, he recovered a judgment against the bank for $104,523.72, that being the amount of his

claim, with interest added to the date of the judgment. Between the time of the failure of the bank and the judgment, the Comptroller had paid to the other creditors, under the requirements of section 5236 of the Revised Statutes, ratable dividends, amounting in the aggregate to sixty-five per cent on the amounts due them, respectively, as of the date when the bank failed. As soon as the claim of White was adjudicated, the Comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent on that amount. The sum paid in this way was $46,560.75, which, it is conceded, was the true amount due him on the basis of distribution assumed by the Comptroller. White claimed that the dividend should be paid on the face of the judgment, which would have given him $67,940.41 The difference between the amount claimed and that paid is $21,379.66. The present suit was brought to compel the payment of this difference. The court below decided in favor of the Comptroller, and White sued out this writ of error for the review of a judgment to that effect.

The pleadings are somewhat inartificially drawn, but both parties ask that all matters of form may be disregarded, and their rights determined upon the facts, about which there is no disagreement.

Section 5236 of the Revised Statutes, under which the question to be decided arises, is as follows:

"From time to time * * * the Comptroller shall make a ratable dividend of the money * * * paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

The Comptroller decided that the payment to White should be on the basis of the amount due him on his adjudicated claim as of the date of the failure of the bank, because the dividends to the other creditors had been calculated in that way, and all he was entitled to was a share in the proceeds of the assets equal to what had been distributed to others during the pendency of his litigation. In this we think the Comptroller was right. Dividends are to be paid to all creditors ratably; that is to say, proportionally. To be proportionate they must be made by some

uniform rule. They are to be paid on all claims against the bank previously proved or adjudicated. All creditors are to be treated alike. The claim against the bank therefore must necessarily be made the basis of the apportionment. If the Comptroller is satisfied with the proof which is furnished to him he can allow the claim, and when the allowance is made the creditor becomes entitled at once to participate in all dividends that may be declared. If the Comptroller declines to recognize the claim as valid, it must be established by the adjudication of some competent court before it can share in the distribution of assets. When adjudicated in favor of the creditor it is established as a claim against the bank, and must be treated accordingly by the Comptroller. The business of the bank must stop when insolvency is declared. R. S., § 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty therefore in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratably, as the law requires.

It is insisted however on the part of the relator, that he is entitled to dividends on his judgment, as that is the amount adjudicated to him, and the advantage he will get in this way is no more than just, because of the trouble and expense he was put to in carrying on his litigation, and the delay he has suffered in getting his money. The question here is, not whether he should be paid interest on the several items of percentage which make up the aggregate of sixty-five per cent, from the time of the payments of dividends to other creditors until his claim was adjudicated, but whether the amount of his judgment must be taken as the sum on which his dividend is to be paid. As has already been seen, the dividends are to be paid on the adjudicated claim, not on the amount due upon the claim when adjudicated. The judgment established the claim as a claim

against the bank at the time of the insolvency, and the amount due when the judgment was rendered. Thus the claim was adjudicated, and the amount due at the date of the judgment ascertained; but for the Comptroller to pay the relator on the amount due him at that time, and the other creditors on the amount due them eight years before, when the insolvency occurred, would certainly not be making ratable dividends from the assets on all claims against the bank. It was clearly right therefore to ascertain from the judgment how much was due on this claim at the date of the insolvency, and make the distribution accordingly. The trouble and expense which the relator has been put to for the establishment of his claim are but incidents to the business in which he was engaged. It was the duty of the Comptroller, if not satisfied of the correctness of the claim when presented, to disallow it, and if an attempt was made to obtain its adjudication, to make such defense as in his judgment was proper. No provision is made by law for the payment of the expenses of the claimant in his litigation beyond the taxable costs, and necessarily that loss must fall on him, as it does on every one who has the misfortune to be driven to the courts for the judicial determination of his rights.

The court below having refused the *mandamus*, its judgment to that effect is affirmed.

Judgment affirmed.

REYNOLDS v. FIRST NAT. BANK OF CRAWFORDSVILLE, INDIANA.

(112 U. S. 405.)

Trial — on bill and answer — replication. Jurisdiction to quiet title — bill in equity — quit-claim deed — equitable title. National banks — power to purchase real estate — creditors — liens — payment.

After the setting of the case down for hearing on bill and answer, after a cause has been so set down, a motion to dismiss the suit for want of timely filing of the replication is too late.

A Circuit Court of the United States has jurisdiction to quiet the title of a purchaser of land, as against a deed averred by the bill and not denied by the answer to be void on its face.

Reynolds v. First National Bank of Crawfordsville, Indiana.

Where R. holds an estate subject to mortgage and other liens for its full value in the hands of B., and is adjudicated a bankrupt, if no debts have been proved against his estate, and he is discharged, and his assignee in bankruptcy has fully settled his estate, a quit-claim deed, by R. to B., vests a clear equitable title, and B. may maintain a bill in equity against R. to quiet the title.

A National bank may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted; and if in order to secure the same debt, it purchases other real estate not mortgaged to it, that does not affect the title to the land it was authorized to purchase.

Where B. agrees with R. to pay R.'s debts which are liens upon his estate and satisfies the creditors, and takes an assignment of the liens to himself, R. cannot complain.

APPEAL from the Circuit Court of the United States for the District of Indiana.

This was a bill in equity to quiet title and restrain waste, filed by the appellee, First National Bank of Crawfordsville, Indiana, against the appellant, Harris Reynolds. The bill alleged in substance that on August 18, 1875, Reynolds was indebted to the bank in the sum of $7,000, which was evidenced by his note of that date and amount, with Isaac M. Vance and James H. Watson as sureties; and that on the day just mentioned, in order to indemnify the sureties, Reynolds executed a mortgage on certain real estate; that on September 17, 1877, Reynolds executed to the bank another mortgage on the same lands to secure an additional sum of $3,000 which he at the date owed the bank; that on August 30, 1878, Reynolds was adjudged a bankrupt, and John W. Baird was appointed assignee of his estate; that on April 18, 1879, the assignee reported to the Bankruptcy Court that no assets of the bankrupt had come to his hands and no debts been proven against his estate, whereupon the estate was settled, and both the assignee and the bankrupt discharged; that before the discharge of the assignee, to-wit, on April 11, 1879, Reynolds stated to the bank that no claims had been proven against his estate, and that the register in bankruptcy had given him a writing showing that fact, and also showing that the title to the real estate covered by the mortgage to the bank had re-vested in him; that relying upon this statement the bank agreed with Reynolds, Vance and Watson that it would release the two latter from their liability on the note for $7,000, in consideration of which Vance and Watson agreed

to pay the bank a certain sum of money and assign to it the mortgage executed to them by Reynolds for their indemnity, and Reynolds agreed to convey the mortgaged property to the bank, but was to be allowed to retain possession thereof until March 1, 1880, and that these agreements were executed; that afterward the bank purchased a certificate of purchase at sheriff's sale of a certain part of the mortgaged premises which had been sold upon a judgment senior to the mortgage to the bank, and at the expiration of the time for redemption took a sheriff's deed for the land described therein; that the bank was compelled to pay $1,286.60 in discharge of a school-fund mortgage upon the real estate mortgaged to it; that the bank purchased from Ann Smith a decree against said land, and took an assignment thereof to itself; that "said purchases and assignments were made upon the faith of the agreement and deed of Reynolds, and for the purpose of saving expense of foreclosing said liens, and that the amount of liens so held * * * was fully equal to the value of said real estate at the time of said agreement;" that Reynolds, for the purpose of annoying complainant and casting a cloud upon its title and delaying it in getting possession, claimed that after the execution of the deed to the bank, Baird, the assignee, executed to him a quit-claim deed for the same real estate, under which he claimed to be the owner; that this deed was wholly inoperative, null and void, because the interest which it purported to convey never had passed from Reynolds, and because it was made without any authority from the Bankruptcy Court, and because it was executed by a party out of possession, and as to whom there was an adverse possession. It was averred, in an amendment to the bill, that the deed from Baird, the assignee, to Reynolds was executed after the latter had made his deed to the bank; that Reynolds had caused the deed of the assignee to himself to be recorded; and that under it he was asserting a title paramount to that of the bank, and was threatening to commit waste, and was insolvent. The prayer of the bill was for a decree quieting the title of the bank and enjoining waste by Reynolds.

The answer of Reynolds was filed September 20, 1880. It admitted that he was indebted to the bank, as charged in the bill, in the sum of $7,000, for which Vance and Watson were his sureties,

and that he had executed to them the indemnifying mortgage mentioned in the bill. It admitted the averments in respect to his bankruptcy, but denied that he had made to the bank the representations that the assignee in bankruptcy had given him a statement in writing showing that no debts had been proven against his estate in bankruptcy, and that the title to his real estate had been revested in him. The answer averred that prior to the execution of the deed by Reynolds to the bank, the latter proposed to him that it would pay off all his debts which were liens upon his real estate, and permit him to retain possession thereof until March 1, 1880, on condition that Reynolds would convey to the bank, by quit-claim deed, the mortgaged premises, and upon the further condition that Vance and Watson would convey to the bank, by deed of warranty, two hundred acres of land owned by them, and that this proposition was accepted; that the consideration for the said contract between Reynolds, Watson, Vance, and the bank pursuant to which he executed the quit-claim deed to the bank, was this undertaking and agreement of the bank; that Vance and Watson complied on their part with the agreement, and conveyed, with covenants of warranty, to the bank two hundred acres of land owned by them; that it was upon the faith of this agreement, and none other, that the quit-claim deed was executed by Reynolds; that when this agreement was entered into, the estate in bankruptcy of Reynolds was unsettled, as the bank knew, and that the purchase of the sheriff's certificates, and other purchases made and assignments taken by the bank, were in violation of the agreement under which Reynolds made the deed to the bank. The answer admitted the execution and delivery of the deed from Baird, the assignee, to Reynolds, and that Reynolds was claiming whatever title the deed conferred on him, and denied that he had threatened to commit waste on the premises.

On May 3, 1881, the cause was set down for hearing on May 11th, on bill and answer by counsel for the bank, and of this the defendant had immediate notice. On the day fixed for the hearing the counsel for Reynolds moved the court to dismiss the bill for failure of the complainant to except to the answer or to file replication thereto. The motion to dismiss the bill was overruled. The cause was then heard upon bill and answer, and the court

found that the equity of the case was with the complainant; that the material averments of the bill, as amended, were true, except the averment as to waste and threatened waste; that the various instruments set forth in the bill had been executed as charged; that Baird, the assignee in bankruptcy, had executed the deed to Reynolds as charged; that this deed was "wholly inoperative, null and void," and that the assertion of title thereunder cast a cloud upon complainant's title; and that the complainant was the owner of and entitled to the possession of the real estate in controversy. A decree was entered on these findings quieting complainant's title, and declaring the deed from Baird to Reynolds void. From this decree Reynolds appealed.

D. W. Voorhees, for appellant.

J. E. McDonald and *J. M. Butler*, for appellee.

Woods, J. The first complaint of the appellant is that the court overruled his motion to dismiss the bill, the appellee having failed to file a replication to the answer within the time prescribed by the equity rules. The motion was properly denied. The sixty-sixth equity rule provides that "whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed insufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereof. * * * If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as of course, for a dismissal of the suit, and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting, to speed the cause, and to such other terms as may be directed." The rule thus places it in the defendant's power to compel the complainant to put the case at issue or to go out of court. The complainant always has the option of setting the case down for hearing on bill and answer, instead of filing a replication, and if the defendant neglects to enter the order for the dismissal of the suit for want of replication until after the cause has been set down for hearing on bill and answer, a motion by the defendant to dismiss the suit for

want of replication is incongruous and untimely. On setting the cause down for hearing on bill and answer the case is put at issue, the answer becomes evidence (equity rule 41, cl. 2), and the only evidence the defendant needs, for it must be taken as true in all respects. *Brinkerhoff* v. *Brown*, 7 Johns. Ch. 217; *Grosvenor* v. *Cartwright*, 2 Ch. Cas. 21; *Barker* v. *Wyld*, 1 Vern. 140; *Perkins* v. *Nichols*, 11 Allen, 542; *Dale* v. *McEvers*, 2 Cow. 18. There is therefore no necessity for a replication or for the taking of testimony. The setting the case down for hearing on bill and answer is in effect a submission of the cause to the court by the complainant on the contention that he is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer. It is plain therefore that after the cause had been so set down the motion of defendant to dismiss the suit for want of the timely filing of the replication came too late, and was rightly overruled.

The appellant next complains of the decree rendered by the Circuit Court, and his first objection is that the court had no jurisdiction to quiet the title of the appellee, as against a deed averred by the bill, and not denied by the answer, to be void on its face. The contention is, that a deed void on its face is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the Legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. *Case of Broderick's Will*, 21 Wall. 520. And, although a State law cannot give jurisdiction to any Federal court, yet it may give a substantial right of such a character that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty, or of common law. *Ex parte McNeil*, 13 Wall. 243. While therefore the courts of equity may have generally adopted the rule that a deed void upon its face does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a

cloud upon the title, and what the State laws declare to be such, the courts of the United States sitting in equity have jurisdiction to remove. This was expressly held in the case of *Clark* v. *Smith*, 13 Pet. 202, where it was said by this court: "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature." * * * * *

The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. Section 1070 of the Revised Statutes of Indiana, of the year 1881, provides as follows: "An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title." This act confers upon any one against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action in the courts. Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. *Marot* v. *Germania Building Association*, 54 Ind. 37; *Jeffersonville, etc., R. Co.* v. *Oyler*, 60 id. 383. The bill of complainant in this case complies with this rule by averring that "said Reynolds is, under his deed" from Baird, the assignee, "claiming and asserting title paramount to the title of this complainant;" and the answer of the defendant admits, that under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him. The question whether under such a statute as that of Indiana, and under the facts stated, the Circuit Court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this court in the case of *Holland* v. *Challen*, 110 U. S. 15. In that case a statute of Nebraska was under review, which

provided that "an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title." The court, speaking by Mr. Justice FIELD, declared, in substance, that this statute dispensed with the general rule of courts of equity, that in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law, or founded on undisputed evidence or long-continued possession. If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that in this case the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face. As the same statute authorizes the court to take cognizance of the case, even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support.

It is next objected to the decree of the Circuit Court that the appellee's title was itself doubtful, and the bill should for that reason have been dismissed; but it is apparent that the appellant was entitled, in equity, to all of his estate in bankruptcy not required for the payment of his debts. This estate, as appears by the averments of the bill not denied by the answer, was subject to mortgage and other liens held by the appellee equal in amount to its full value. When therefore no debts having been proven against his estate, the appellant was discharged, and his assignee in bankruptcy had fully settled the estate, the quit-claim deed executed by the former to the appellee vested in the latter a clear equitable title to the premises in controversy, and this was sufficient, under the Indiana statute, to justify the relief prayed for in the bill.

The appellant next insists that the appellee, being a National bank, had no power, under the act establishing National banks,

to take a conveyance of the two-hundred-acre tract of land from Vance and Watson, and that as such a conveyance formed a part of the agreement by which the appellee acquired title to the land conveyed to it by the appellant, the title to the latter tract is void. The National Banking Law (Rev. Stat., § 5137) provides that a National banking association may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. The power to purchase the real estate in dispute was therefore clearly conferred by the statute. The fact, that in order to secure the same debt, it purchased other real estate not mortgaged to it, cannot affect the title to the land which it was authorized to purchase; but if there was any force in this objection to the title, it could not be raised by the debtor, for where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable. The sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *National Bank* v. *Matthews*, 98 U. S. 628; 2 Nat. Bank Cas. 12; *National Bank* v. *Whitney*, 103 U. S. 99, *ante; Swope* v. *Leffingwell*, 105 id. 3.

The appellant insists, further, that the appellee did not perform that part of his contract by which he agreed to pay off the debts of appellant which were a lien upon the property in question; that the purchase of the sheriff's certificate, and the purchase and transfer to himself of the decree in favor of Ann Smith were not payment of the debts. This is an objection to the form rather than the substance of the transaction. The debts, so far as the original creditors are concerned, were satisfied, and this, together with their assignment to the appellee, who was under a contract with the appellant to pay them, was, in substance and effect, a payment. There is no averment that the appellee had any purpose to attempt their enforcement against the appellant, and, if such attempt should be made, it could not, in the face of the contract, succeed.

We think that the decree of the Circuit Court is sustained by the admissions of the answer, and that there is no error in the record. *Decree affirmed.*

In Roebling v. First Nat. Bk., 30 Fed. Rep. 744, it was briefly held by Jackson, J. (W. Va.), that a National bank which has lent money on timber land may, to protect itself, buy the land on foreclosure and cut and sell the timber. Citing First Nat. Bk. v. Nat. Ex. Bk., 92 U. S. 122; 1 Nat. Bank Cas. 124.

Fortier v. New Orleans Nat. Bank.

New Orleans Nat. Bank v. Fortier.

(112 U. S. 440.)

Appeal — jurisdiction — practice. Marriage — wife's separate property — mortgage. Mortgage — bank.

Where a suit is brought in the United States court by one in his individual name, as president of a National bank, and the whole record shows that the suit was treated by both parties as that of the bank, and not of the individual, the defendant will not be allowed, on final hearing, to assert for the first time that the individual and not the bank was the complainant.

Where a married woman borrows money with the authorization of the husband, and the sanction and certificate of the judge, the creditor is not bound to show that the money was used for her separate benefit and advantage; but the debt may be enforced against her separate property mortgaged to secure it, unless she shows that with the knowledge or connivance of the lender, the money was borrowed and used solely for the benefit of her husband.

A loan of money made by a National bank on the security of a mortgage is not in violation of the National Banking Act.

An objection to the taking by the bank of a mortgage lien as security for future advances can only be made by the United States.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

Henry C. Miller and *B. F. Jonas*, for Fortier.

Thomas J. Semmes and *John A. Campbell*, for New Orleans Nat. Bank.

Wood, J. These are cross-appeals from a decree in equity in a cause brought by "Albert Baldwin, in his capacity of president of the New Orleans National Bank, a corporation organized under the National Banking Law, against Celestine Louise Fortier," who was a married woman, the wife of Polycarpe Fortier. The purpose of the suit was to enforce the collection of a note "drawn," as the bill avers, "by the said Celestine Louise Fortier to her own order, and by her indorsed with the authorization of her said husband, dated at New Orleans, March 16, 1877, payable one year

after date, bearing interest at eight per cent per annum from maturity until paid, for ten thousand dollars." Leon Godchaux was the payee of the note, who, after its maturity, and but a short time before the suit was brought, transferred it to the New Orleans National Bank. The note was secured by a mortgage, executed by Mrs. Fortier, on three squares and six lots of ground in the city of New Orleans, which were her separate property. The bill by which the suit was commenced prayed for an order of seizure and sale of the mortgaged premises, as provided by the Code of Practice of Louisiana. The mortgage was in the ordinary form of mortgages in Louisiana, and was executed in the usual manner before a notary public and competent witnesses. Appended to it was the following certificate:

"*The State of Louisiana, Parish of Orleans, City of New Orleans — Fourth District Court for the Parish of Orleans.*

I, W. T. Houston, judge of the Fourth District Court for the parish of Orleans, do hereby certify that on this fourteenth day of March, 1877, personally came and appeared before me, at chambers, in the city of New Orleans, Mrs. Celestine Louise Labranche, of lawful age, the wife of Polycarpe Fortier of this city, and by virtue of article 127 of the Revised Civil Code of Louisiana, I did then and there examine the said Mrs. P. Fortier, separate and apart from her said husband, and she stated that she appeared before me for the purpose of obtaining the certificate specified in said article to borrow the sum of ten thousand dollars for her separate benefit and advantage by mortgaging her separate property.

"I do further certify that then and there I examined her touching the object for which the said sum of money was to be borrowed, and that I have by her declaration, made on oath, ascertained to my satisfaction that the sum of ten thousand dollars, which the said Mrs. P. Fortier desires to borrow, is not for her husband's debts nor for his separate advantage or the benefit of his separate estate or for the community, but that the same is solely for her separate advantage, and I therefore give and sign this certificate in pursuance of said article, giving my sanction and authority to said Mrs. P. Fortier, with the authorization of her husband, to hypothecate or mortgage her separate property for the purpose of borrowing the said sum of ten thousand dollars.

"Witness my hand and the seal of said court, this fourteenth day of March, 1877.

W. T. HOUSTON, *Judge.*"

A writ of seizure and sale having issued as prayed for in the bill, Mrs. Fortier filed her plea and a cross-bill. In the latter, she prayed for an injunction to restrain the seizure and sale of the mortgaged premises. The grounds upon which she based her de-

fense to the original bill, and the relief prayed by her cross-bill, were as follows: Admitting that at and before the date of the note and mortgage she was separated in property from her husband, Polycarpe Fortier, she averred that she was possessed in her own right, as of a separate estate, of the property described in the mortgage; that the consideration of the note sued on and secured by the mortgage was in part, money lent to her husband by Godchaux, the payee, and in part, the payment and satisfaction of a debt due from her husband to Godchaux. To show that Godchaux knew that the money was not borrowed for the separate benefit of Mrs. Fortier, the cross-bill further averred that before the execution of the mortgage by her, it was agreed between her husband and Godchaux that the loan should be secured by a mortgage on her husband's property; but the titles not proving satisfactory to Godchaux, it was agreed between him and her husband that the mortgage to secure the loan should be placed on her separate property, and that it should be transferred to the property of her husband when his titles were perfected. For the reasons stated, it was averred that the note and mortgage sued on were not binding on her property.

There was an answer and demurrer to the cross-bill. The answer denied that the note sued on was given for any other purpose than that expressed in the certificate of the judge appended to the mortgage, and averred that the money raised on the note was all paid to Mrs. Fortier, except the discount, amounting to $1,025, and the sum of $1,200, which was, by her direction, handed to the notary to pay taxes due on the mortgaged premises. The demurrer applied to all those averments of the cross-bill "tending to show that the said note, and mortgage granted by her," Mrs. Fortier, "to secure the same, were not executed for her own use and benefit, in opposition to her sworn declarations made on her examination by the judge of the Fourth District Court, and the certificate of the said judge to that effect, and to all those averments in regard to the application made of the money lent by said Godchaux on the faith of said mortgage." It was shown by the evidence that the mortgage and note were executed in the office of the notary; that Mr. and Mrs. Fortier and Godchaux, the payee of the note and the mortgage, were present; that upon the execu-

tion and delivery of the papers, Godchaux retained from the $10,000, for which the note was given — *First*, the discount of ten per cent, on the face of the note, amounting to $1,025; and, *second*, the amount of a debt due from Mr. Fortier to him, being the sum of $1,800; that he gave his check to the notary for $1,200, to be applied to the discharge of taxes, etc., which were a lien on the mortgaged premises, that he paid the residue of the $10,000 by handing to Mrs. Fortier his check on the Union National Bank for $5,975, payable to her order. It was further shown that after Mrs. Fortier received the check, it was deposited by Mr. Fortier, with her indorsement, to his own credit in the Louisiana National Bank, and the deposit was drawn out from time to time thereafter on his checks. The proceeds of the check for $1,200 handed to the notary were applied, after deducting the fees of the notary, to the payment of the taxes, interest, and costs, which were a lien on the mortgaged premises.

Robert Duque, a witness for the defendant, who appeared to be the friend and legal adviser of Mr. Fortier, the husband, testified that the latter, before the execution of the note and mortgage in suit, proposed to Godchaux to borrow of him $10,000, and to secure the same by a mortgage on the Fort Leon plantation, of which he was the owner; that Godchaux declined to make the loan on the security offered, on account of some defect in the title, and that the loan was afterward made on the security of the mortgage in suit, with the agreement between Mr. Fortier and Godchaux that when the former perfected his title to the Fort Leon plantation, the mortgage should be transferred to it, and the property of Mrs. Fortier released therefrom. The testimony of Duque on these points was directly and unequivocally contradicted by the deposition of Godchaux. Godchaux also testified, that before the loan was made to Mrs. Fortier, he went to see the property which was afterward mortgaged; that he was shown over it by Mrs. Fortier, who told him she wanted to borrow the money to improve the property and pay off the taxes due upon it. This testimony of Godchaux in reference to his inspection of the property and the statements of Mrs. Fortier was not directly contradicted by her, although she was examined as a witness in the case, nor was she questioned by her counsel in reference thereto. She testi-

fied that she received no money from Godchaux on the loan made by him, and that she did not receive any money on his check, which she admitted was indorsed by her, and that none of the money loaned was used for her separate benefit. Upon final hearing, the Circuit Court rendered a decree for the complainant in the original bill for $7,860, with interest thereon from March 16, 1878, and five per cent, attorney's fees, having deducted from the amount appearing to be due upon the note of Mrs. Fortier the sum of $2,140, that sum being the amount retained by Godchaux out of the proceeds of the note of Mrs. Fortier for the debt due him by Mr. Fortier, with the interest, etc. The court dismissed the cross-bill with costs. Both parties appealed.

It is first assigned for error by Mrs. Fortier, the original defendant, that as the bill was filed in the name of "Albert Baldwin, in his capacity of president of the New Orleans National Bank," against the defendant, who is alleged to be a citizen of Louisiana, it does not appear that the parties were citizens of different States, and as no other ground of jurisdiction is averred, the Circuit Court does not appear to have had jurisdiction of the case. If Baldwin was in fact the complainant, there was no ground stated in the petition upon which the jurisdiction of the Circuit Court could rest, and the objection to the jurisdiction could be made at any time. But the counsel for the bank insists that the bank, and not Baldwin, was the complainant. The question is therefore, how is the bill to be construed?

It is clear, upon an inspection of the whole record, that the suit was treated by both parties and by the Circuit Court as the suit of the New Orleans National Bank and not of Albert Baldwin. Every pleading in the case, including the answer and cross-bill filed by the defendant, and every order and decree made by the court, was entitled "*The New Orleans National Bank* v. *C. L. Fortier.*" In the appeal bond given by the defendant, the case was described in the same manner. The cause of action set out in the petition was the cause of action of the bank. The plea of the defendant to the original bill, treated the bank as the complainant by averring that "the said bank is not the holder of the note for value, and that the note was sued on in the name of the bank merely to give the court jurisdiction." The answer to the cross-bill was styled the an-

swer of the New Orleans National Bank. It averred that the bank was the holder of the note and mortgage sued on, and that the bill was intended to be, and was, the bill of complaint of the bank and not of Baldwin. There was no replication to this answer. It is plain therefore that the defendant carried on the litigation on the theory that the bank was the complainant, and the cause was entertained and decided by the Circuit Court on the same assumption. We must adhere to the construction of the bill asserted by the bank and acquiesced in by the defendant. The defendant having herself so construed and treated the bill, will not be allowed on final hearing, in order to defeat the jurisdiction, to assert, for the first time, that Baldwin, and not the bank, was the complainant. It follows that the objection to the jurisdiction is not well taken.

We now come to the merits of the case. The contention of the counsel for complainant is that Mrs. Fortier, having by the authorization of her husband and of the judge of the Fourth District Court, evidenced by his certificate, been empowered to borrow the money sued for to be used for her separate benefit and advantage, and to mortgage her separate property therefor, is concluded by the certificate of the judge, and cannot be heard to deny that the money was borrowed for her own use, or to assert that it was borrowed to pay her husband's debts, or for his separate advantage. On the other hand the counsel for the defendant insist that the money was in fact borrowed by Mrs. Fortier for the use of and to pay the debts of her husband, which Godchaux, the payee of the note, well knew, and that the money borrowed was so applied by the husband, and that she is not precluded by the certificate of the judge from showing these facts, and that being shown, they are a defense to the suit.

By article 2412, Civil Code La. 1825, it was provided as follows: "The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." This article is now article 2398 of the Civil Code of 1870. The Supreme Court of Louisiana, construing it, has repeatedly decided that a debt contracted by a married woman, whether separated in property from her husband or

not, could not be enforced against her unless the creditor established affirmatively that the debt inured to her separate benefit. *Dranguet* v. *Prudhomme*, 3 La. 74; *Pascal* v. *Sauvinet*, 1 La. Ann. 428; *Erwin* v. *McCalop*, 5 id. 173; *Brandegee* v. *Kerr*, 7 Mart. (N. S.) 64; *Beauregard* v. *Her Husband*, 7 La. Ann. 294; *Moussier* v. *Zunts*, 14 id. 15. In the case last cited, the court say: "It is a principle that has come down to us from the laws of Spain, that he who contracts with a married woman must show affirmatively that the contract inured to her advantage. The exception was when the wife renounced the sixty-first law of Toro, but this exception no longer exists."

This article, thus construed, still continues to be the law of Louisiana, except as modified by the act of 1855, which now constitutes articles 126, 127 and 128 of the Revised Code of 1870. They are as follows:

"Art. 126. A married woman over the age of twenty-one years may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

"Art. 127. In carrying out the power to borrow money or contract debts, the wife, in order to bind herself or her paraphernal or dotal property, must, according to the amount involved, be examined at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted; and if he shall ascertain either the one or the other are for her husband's debts, or for his separate benefit or advantage, or for the benefit of his separate estate or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126.

"Art. 128. If the wife shall satisfy the judge that the money about to be borrowed or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all the courts of this State and have the same effect as if made by a *feme sole*."

The effect of these articles is simply to establish a new rule of evidence in cases of loans of money made to married women. The cases in which they have been construed by the Supreme Court

of Louisiana show clearly that the contention of the complainant, that the certificate of the judge is conclusive evidence of the fact that the money lent to a married woman was for her sole benefit, and that she will not be allowed to contradict it, cannot be sustained. The construction put upon these articles is that the effect of the authorization and certificate of the judge was to relieve the creditor from the burden of proving that the money lent by him to the wife inured to her benefit, and to cast the burden on the wife to prove that it did not. *Bank* v. *Barrow*, 21 La. Ann. 398. In the case of *Barth* v. *Kasa*, 30 id. 940, it was held that prior to the act of 1855 the burden of proof to bind the wife, was on the creditor, but that under that act, when the judge's authorization had been obtained, the burden of proof rested on the wife to show that she was not bound. In *Claverie* v. *Gerodias*, 30 La. Ann. 291, the plaintiff holding the note of Gerodias, a married woman, secured by mortgage on her paraphernal property, executed by the authorization of the judge, took out executory process thereon. Mrs. Gerodias filed an opposition thereto, on the ground among others, that her note and mortgage were given for the purpose of securing the debt of the husband to Claverie. The latter admitted that the note was executed by Mrs. Gerodias to enable her husband to obtain the means of carrying on his trade, "and was given by him to the respondent (Claverie) for that purpose, to the knowledge of his wife." Upon these facts the court said: "The law forbids the wife to become security of her husband, or to bind herself or property for his debts. Her note for such a purpose, in the hands of the husband's creditor, who takes it knowingly, is utterly void. The act of 1855 (now articles 126, 127, 128, Civil Code) has no application to such a case as is here presented." And the court affirmed the judgment of the lower court, which decreed the nullity of the mortgage, the erasure of its inscription, and directed the surrender of her note to Mrs. Gerodias, notwithstanding the fact that the note and mortgage had been executed by virtue of the authorization and certificate of the judge, as provided in the act of 1855. In *Barth* v. *Kasa*, *ubi supra*, it was held that when a married woman has, even under the authorization of the judge, executed her note and mortgage on her separate property to secure it, she may show

by way of defense thereto, that she gave the note and mortgage for the debt of her husband, being induced thereto by her husband and the creditor. So in *Hall* v. *Wyche*, 31 La. Ann. 734, it was held that the authorization of a judge to a married woman to borrow money, and execute a mortgage to secure its repayment, does not preclude her from proving that with the knowledge of the creditor, the mortgage was given to secure an antecedent debt of the husband due to him. These cases show conclusively that the contention of counsel for the complainant cannot be maintained.

On the other hand, it does not follow that because the money borrowed by the wife with the authorization of the judge was used to pay her husband's debts, the note and mortgage given therefor are void and cannot be enforced. To make such a defense good, it must be shown that the creditor knew when he made the loan that the money was not to be used for the separate benefit or advantage of the wife; for the lender, having in good faith paid the money to the wife or to another by her direction, is not bound, since the passage of the act of 1855, to see that it is used for her benefit. It has been so held by the Supreme Court of Louisiana. In *McClellan* v. *Dane*, 32 La. Ann. 1197, the defendant was a married woman, who had executed by the authorization of the judge the note and mortgage sued on. She alleged by way of defense that the note and mortgage were obtained from her through the influence of her husband, who received the money for which the note and mortgage were given, and that therefore as to her they were without consideration. In support of her defense Mrs. Dane offered evidence tending to show that the money borrowed was subsequently received by her husband, and by him used for his own purposes. This evidence was admitted by the court below, and its admission was declared by the Supreme Court to be error. In giving judgment the court said: "The check representing the borrowed money was delivered to the wife, who indorsed the same and received the money which it called for, and to require more from the lender in such cases would be to defeat the very object of the law. * * * Our jurisprudence is firmly settled on this question, and it is unnecessary to quote authorities in support of the proposition that

in the absence of any allegation of fraud against the creditor himself, married women are bound, as all other persons, by their contracts and mortgages, executed under proper authorization, as required by the law of 1855 (Civil Code, 127, 128), and cannot be allowed by parol testimony to attempt to disprove the certificate of the judge and their own authentic declarations in acts of mortgage. Nor will the law authorize the inquiry into the subsequent disposition made of the funds borrowed by married women when properly authorized thereto. The law does not and cannot confer upon the lender in such circumstances the power and authority to watch over and control the acts of the married woman who has borrowed money from him, so as to prevent the improper use of the same." In the still later case of *Dougherty* v. *Insurance Co.*, 35 La. Ann. 629, the Supreme Court of Louisiana said: "Objections founded on the irregularity of the proceedings before the judge, and on the use made of the money and the like, in the absence of fraud or complicity on the part of the lender, have no force. The jurisprudence is now well settled that in such case the lender is not bound to look behind the judge's certificate, and is not concerned as to the actual use of the money after it is paid to the wife or according to her direction." See also *Pilcher* v. *Pugh*, 28 La. Ann. 494, and *Henry* v. *Gauthreaux*, 32 id. 1103.

The result of these authorities, succinctly stated, is that since the act of 1855, when a married woman, with the authorization of her husband, and the sanction and certificate of the judge, borrows money, the creditor is not bound to show that the money was used for her separate benefit and advantage, but the debt may be enforced against her, and her separate property mortgaged to secure it, unless she shows that with the knowledge or connivance of the lender the money was borrowed and used, not for her separate benefit, but for that of her husband. This conclusion supports the decree of the Circuit Court. When Godchaux deducted and retained out of the money loaned on the note and mortgage of Mrs. Fortier, the sum of $1,800 to pay a debt due to herself from her husband, and paid over to her, or by her direction only, the residue, he was acting, so far as the sum just mentioned is concerned, in complicity with the husband and in

fraud of the law, and he cannot shield himself under the authorization of the judge. This sum, with the interest thereon, was properly deducted from the amount due on the note and mortgage. The $1,200 paid by Godchaux to the notary, by the direction of Mrs. Fortier, to clear off taxes, with the interest and costs, which were a lien upon that property mortgaged by her, was applied for her separate benefit and advantage, and she cannot escape liability for it. As to the $5,975, the residue of the loan, we are of the opinion that the defendant has not made it appear affirmatively by preponderance of proof, as she was bound to do, that the money was borrowed by her with the knowledge or connivance of Godchaux to pay off the debts, or for the use of her husband. Godchaux therefore having handed to the defendant a check, payable to her own order, for the residue of the loan, his duty ceased. Under the act of 1855 he was not, as we have seen, bound at his peril to take care that she applied the money to her own separate benefit and advantage. So far therefore as the defense to the enforcement of the money paid by the check rested in the averment that the money borrowed of Godchaux was with his complicity borrowed for the use of the husband, and not for separate advantage of the wife, it must fail.

Complaint is made in behalf of Mr. Fortier that the court erred in enforcing by its decree a loan of money made by a National bank on the security of a mortgage; the contention being that the loan on such a security was unauthorized by the National Banking Act, and was therefore void. In the cases of *National Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12, and *National Bank* v. *Whitney*, 103 U. S. 99; *ante* 5, this point is expressly decided against the contention of the defendant, and in the latter case it was also held that an objection to the taking by the bank of a mortgage lien as security for future advances could only be made by the United States.

It follows from the views we have expressed that the decree of the Circuit Court was right, and should be affirmed; and it is so ordered.

BOYER v. BOYER.

(113 U. S. 689.)

Taxation — uniformity and equality.

National bank shares may not be subjected to State taxation, where a very material relative part of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempted from such taxation.

Capital invested in National bank shares was intended by Congress to be placed upon the same footing of substantial equality in respect of taxation by State authority as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise.

IN error to the Supreme Court of the State of Pennsylvania.

Charles W. Wells, for plaintiff in error.

W. J. Whitehouse, for defendant in error.

HARLAN, J. The plaintiff in error brought this suit in a State court of Pennsylvania for an injunction restraining the commissioners of Schuylkill county from levying *a county tax* for the year 1883 upon certain shares in the Pennsylvania National Bank — an association organized under the National Banking Act. The suit proceeds upon the ground that such levy violates the act of Congress prescribing conditions upon State taxation of National bank shares, in this: that "other moneyed capital in the hands of individual citizens" of that county is exempted, by the laws of Pennsylvania, from such taxation. A demurrer to the bill was sustained, and the suit was dismissed. Upon appeal to the Supreme Court of Pennsylvania that judgment was affirmed on the ground that the laws of the State under which the defendants sought to justify the taxation were not repugnant to the act of Congress.

State taxation of National bank shares was permitted by the forty-first section of the act of Congress of June 3, 1864, subject to the restriction that it should not be at a greater rate

than that imposed upon other moneyed capital in the hands of individual citizens of the same State. 13 Stat., chap. 106, § 41. But that section contained a proviso to the effect "that the tax so imposed, under the laws of any State, upon shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." The case of *Lionberger* v. *Rouse*, 9 Wall. 469; 1 Nat. Bank Cas. 41, arose under that act. The question there was whether shares in a National bank were exempt from State taxation merely because two State banks of issue, organized before the National Banking Act was passed, and which held a very inconsiderable portion of the banking capital of the State, had by their charter the right to pay a certain per cent on the amount of their capital stock in full of all State bonus and taxes — an amount less than that imposed upon National bank shares. The shares of other associations in the State having the privileges of banking, except the power to emit bills, were taxed like the shares in National banks. It was held that Congress meant, by reference in the act of 1864 to taxation of State bank shares, to require, as a condition to taxation by the State of shares in National banks, that she should, unless restrained by valid contract, tax in like manner the shares of banks of issue of her own creation. There was no question in that case of discrimination against capital invested in National bank shares in favor of moneyed capital, which was invested otherwise than in bank stock.

But the act of 1864 was so far modified by that of February 10, 1868 (15 Stat., chap. 7), that the validity of such State taxation was thereafter to be determined by the inquiry whether it was a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in State banks. The effect, if not the object of the latter act, was to preclude the possibility of any such interpretation of the act of Congress as would justify States, while imposing the same taxation upon National bank shares as upon shares in State banks, from discriminating against National bank shares, in favor of moneyed capital not invested in State bank stock. At any rate the acts of

Congress do not now permit any such discrimination. Section 5219 of the Revised Statutes, is as follows:

"Nothing herein (the National Banking Act) shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which such association is located, but the legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to two restrictions: that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association, owned by non-residents of any State, shall be taxed in the city or county where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value as other real property is taxed."

Whether the proposed taxation for *county* purposes of the plaintiff's shares of National bank stock is at a greater rate than is assessed for like purposes on other moneyed capital in the hands of individual citizens, is the single question upon which depends the affirmance or reversal of the judgment.

Before examining the statutes of Pennsylvania upon the subject of taxation, it will be well to ascertain how far the decisions of this court have fixed the true meaning of the words "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The Supreme Court of Pennsylvania is of opinion that the commissioners are fully sustained by the decision in *Hepburn* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113. In that case the question was whether the owner of National bank shares residing in Cumberland county, Pennsylvania, was exempt from a local tax by reason of a statutory exemption from all taxation in that county, except for State purposes, of "mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate," except mortgages, judgments and articles of agreement given by corporations. Laws Penn. 1868, p. 61. The value of such securities (if they could all be properly so described) as compared with other moneyed capital in the hands of individual citizens in that locality, did not appear in that case. What the court had to decide, and all that it did decide, was whether the exemption from local taxation of mortgages, judgments, recognizances and money due upon agree-

ments for the sale of real estate in the hands of individuals, was a partial exemption only; that is, whether it was so substantial in its nature and operation as to affect the integrity of the general assessment for local purposes. The court, after observing that money at interest was not the only moneyed capital to which the National Banking Act had reference, and that the words "other moneyed capital" included investments in bank shares and other stocks and securities, said: "This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily, there may be other moneyed capital in the locality than such as is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." That case is authority for the proposition that a *partial* exemption by a State, for local purposes, of moneyed capital in the hands of individual citizens, does not of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of National bank shares held by persons within the same jurisdiction. But it is by no means an authority for the broad proposition that National bank shares may be subjected to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempted from such taxation. Indeed, such an interpretation of the statutes might entirely defeat the purpose that induced Congress to confine State taxation of National bank shares within the limit of equality with other moneyed capital; for it would enable the States to impose upon capital invested in such shares materially greater burdens than those to which other moneyed capital in individual hands is subjected.

The case of *Adams* v. *Nashville*, 95 U. S. 19; 1 Nat. Bank Cas. 148, is also relied upon to support the judgment below. The question there raised was whether an alleged exemption from municipal taxation, under an ordinance of a city, of its interest-bearing bonds, operated to exempt from like taxation the shares of a National bank located in the same city. The court held that as the ordinance had been abrogated by subsequent legislation of the State, no such ex-

emption existed. However, considering the question on its merits, it was said that the act of Congress did not intend "to cut off the power to exempt particular kinds of property, if the Legislature chose to do so." In illustration of this view reference was made to exemptions of homesteads, household furniture, schoolhouses, academies and libraries — regulations sustained, as a general rule, upon grounds of policy and humanity, or because the property exempted is employed for objects more or less connected with the public welfare. And it was observed that the discretionary power of the Legislature over such subjects remained as before the act of 1868; the intention of that statute being to protect corporations formed under its authority from *unfriendly* discrimination by the States in the exercise of their taxing power. "That particular persons or particular articles are relieved from taxation, is not a matter to which either class can object." It is scarcely necessary to say that this language leaves untouched the question as to the power of the State to subject the shares of National banks to taxation, when a very material portion of other moneyed capital in the hands of individual citizens and corporations is exempted from like taxation.

The court has had occasion to examine the provisions of the National Banking Act in several other cases recently determined. *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57; *Pelton* v. *National Bank*, 101 U. S. 143; 2 Nat. Bank Cas. 85; *Cummings* v. *Same*, 101 U. S. 153; 2 Nat. Bank Cas. 74; *Supervisors* v. *Stanley*, 105 U. S. 305; *ante* 33; *Evansville Bank* v. *Britton*, id. 323; *ante* 48. From these cases may be deduced certain rules for the construction of that act: (1) That the words "at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens" refer to the entire process of assessment, which, in the case of National bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of National bank shares and of other moneyed investments of capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital. (2) That a State law which permits individual

citizens to deduct their just debts from the valuation of their personal property of every kind, other than National bank shares, or which permits the tax payer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital.

These decisions show, that in whatever form the question has arisen, this court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital, in the hands of individual citizens, as against capital invested in the shares of National banks. In *People* v. *Weaver*, the court said: "As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against that class of property as compared with other moneyed capital. In permitting the States to tax these shares it was foreseen that the States might be disposed to tax the capital invested in these banks oppressively. This might have been prevented by fixing a limit on the amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from any thing beyond their equal share of the public burdens, said: "You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented."

We come now to consider whether the laws of Pennsylvania, under which defendants propose to levy a tax, for county purposes, upon the plaintiff's shares of stock, are open to the objection that they violate the principle of equality, which the act of Congress intended to establish between capital invested in such shares, and other moneyed capital. By a law of that State, passed March 31, 1870 — upon which the defense mainly rests

—it is provided "that all the shares of National banks, located within this State, and of banks and savings institutions incorporated by this State, shall be taxable for State purposes at the rate of three mills (subsequently four) per annum upon the assessed value thereof; and for county, school, municipal and local purposes at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this State." Laws Penn. 1870, p. 42. This act suggests, upon its face, the inquiry as to what moneyed capital, in the hands of individual citizens, is subject to taxation for county and other local purposes; for such capital, if exempted from local taxation at the date of the passage of that act, remains exempt, unless the Legislature of the State has since subjected it to taxation. Evidently, in respect of taxation for local purposes, the Legislature did not intend by the act of 1870, to remove the then existing exemptions, and subject all moneyed capital, of whatever description, to such taxation; but only to establish a uniform rate of local taxation as between capital invested in National bank shares, and such, and only such, moneyed capital as was then, or might thereafter be, subjected to taxation.

To ascertain what moneyed capital was, at the passage of the act of 1870, or has since become, exempted in Pennsylvania from taxation for county purposes, requires an examination of several statutes, commencing with the one passed in 1844. The latter subjected to taxation, "for all State and county purposes whatsoever," the following personal property: Mortgages; money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; articles of agreement and accounts bearing interest, except notes or bills for work and labor done, and bank notes; shares or stock in any bank, institution or company then or thereafter incorported by or in pursuance of any law of the State, or of any other State or government; shares of stock or weekly deposits in unincorporated saving fund institutions; public loans or stocks, except those issued by the State; money loaned or invested on interest in any other State. 2 Brightly's Purd. Dig. 1380; Laws Penn. 1844, p. 497.

In 1850 shares of stock in State banks, created after the State Banking Act of 1850, were relieved from taxation for county pur-

poses. Laws Penn. 1852, p. 442; *Allegheny Co.* v. *Shoenberger*, 1 Grant, 35. And in 1854 all bonds or certificates of any railroad company incorporated in the State were declared liable to taxation "for State purposes only." 2 Brightly's Purd. Dig. 1369, § 81.

By an act approved April 12, 1859, it was provided that thereafter the capital stock of all banks, savings institutions and companies whatever, of the State, "shall be subject to and pay a tax into the treasury of the Commonwealth annually, at the rate of one-half mill for each one per cent of dividend made or declared by such bank, savings institution, or company;" and in case of no such dividend being declared, then three mills upon a valuation of the capital stock, agreeably to the above act of 1844. The same act exempted from tax upon dividends any institution or company (except banks of issue) then liable for tax on capital stock. It was further declared that that act should not be so construed as to make building associations, plankroad or turnpike companies liable for any tax to the Commonwealth, when such companies make or declare no dividends. Laws Penn. 1859, p. 529. And by an act passed January 3, 1868, it was declared that from and after its passage the shares of stock held by any stockholder in any institution or company incorporated under the laws of the State, which in its corporate capacity is liable to, and pays into the State treasury, the tax imposed by the act of April 12, 1859, "shall not be taxable in the hands of said stockholder, personally, for State, county, or local purposes;" so much of the act of 1844 as imposed a tax for State or county purposes upon any stockholder in his individual capacity being repealed in terms, without relieving such corporations from any tax then imposed by law, or their real estate from any State, county, or local tax to which it then was or might thereafter be subjected. Laws Penn. 1868, p. 1318.

Then followed the act of 1879, by the third section of which every incorporated company or association doing business in Pennsylvania, or having capital employed there in the name of any other company or corporation — except foreign insurance companies, banks, and savings institutions — was required to pay a certain annual tax on its capital stock into the State treasury. Laws Penn. 1879, p. 112.

This brings us to the act of June 10, 1881, whereby mortgages; moneys owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; articles of agreement and accounts bearing interest, except notes or bills for work and labor done; obligations to banks for money loaned; bank notes; shares of stock in banks, banking or saving institutions or companies, then or thereafter incorporated under any law of Pennsylvania; public loans or stocks, except those by that State or the United States; money loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of that State — are declared "to be, and are hereby, taxable for State purposes, at the rate of four mills on the dollar of the value thereof annually; provided, that all mortgages, judgments and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate, shall, after the passage of this act, be exempt from all taxation except for State purposes; provided, the provisions of this act shall not apply to building and loan associations," the money loaned by them being subjected to the same tax as money loaned by individuals. By the second section of the same act, all corporations paying interest on a loan or loans, taxable for State purposes, whether secured by bond, mortgage, recognizance or otherwise, are required to report to the Auditor-General annually the amount of such indebtedness owned by residents of Pennsylvania, and to pay into the State treasury four mills upon every dollar of such indebtedness, such tax to be deducted by the corporation paying it from the interest on such indebtedness; whereupon "such indebtedness, whether secured by bond and mortgage, judgment or otherwise, shall be exempt from other taxation in the hands of the holders thereof." Laws Penn. 1881, p. 99.

Unless we greatly misapprehend the effect of this legislation, a very large amount of property, made subject by the act of 1844 to taxation for both State and county purposes, has since been relieved from the burdens of county taxation; while the imposition by the act of 1870 upon National bank shares of local taxation at the same rate as was at the latter date, or has been since, imposed upon other moneyed capital in the hands of individual citizens of the State, leaves such shares subject to taxation as pro-

vided in the act of 1844. The burden of county taxation, imposed by the latter act, has, at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which, in its corporate capacity, is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations, which are taxable for State purposes, when such corporations pay into the State treasury the required tax on such indebtedness.

As the present case comes before us upon demurrer to the bill, we have, excepting the allegations of the latter, no means of determining the value of the capital thus exempted from the county taxation which is imposed upon capital invested in National bank shares. After referring to the acts of 1870 and 1881, the bill charges: "That for the year 1881, as is shown by the public report and by the books of the Auditor-General of Pennsylvania, the sum of $1,692,938.66 was paid into the State treasury as tax upon the capital stock of such corporations by them in their corporate capacity, which sum of money was paid upon a gross capital stock, of the corporations paying the same, of the value, approximately stated, of $564,000,000. That it appears, as is shown by the books and published report of the Secretary of Internal Affairs for the year 1881, that the total valuation throughout the State for that year of 'all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond, or judgment; also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes), and all public loans or stocks whatsoever, except those issued by this State or the United States, and all moneys loaned or invested on interest in any other State, and all other moneyed capital in the hands of individual citizens of the State' -- amounts to $74,931,765. That for the same year, as is shown by the books and published reports of the Auditor-General, a tax was paid into the State treasury upon corporation

and municipal loans, not probably included in the foregoing sum, upon an aggregate valuation of $51,404,162.50. That by the provisions of section 1 of the act of June 10, 1881 (P. L. 99), all mortgages, judgments, and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate, were exempt from all taxation except for State purposes. That section 2 of said act of 1881 exempts from local taxation, in the hands of the holders thereof, all loans issued by corporations paying interest thereon, where such corporations pay into the State treasury the State tax of four mills on each dollar thereof; and by act of May 1, 1854 (P. L. 535), 'all bonds or certificates of indebtedness of any railroad company incorporated by this Commonwealth be, and the same shall be, liable to taxation for State purposes only.' That the total paid-in capital of all the State banks and savings institutions in said Commonwealth, other than National banks, as appears by the books and published reports of the Auditor-General for the year 1881, is $7,161,740.68, while the total paid-in capital of the National banks located within said State, in said year, amounted to $57,452,051."

The demurrer, of course, admits these allegations of fact to be true. Their materiality is not affected by the circumstance that they are stated to appear, also, upon the books and published reports of the Auditor-General and the Secretary of Internal Affairs of Pennsylvania. Upon such facts, and in view of the revenue laws of the State, it seems difficult to avoid the conclusion that, in respect of county taxation of National bank shares, there has been and is such a discrimination, in favor of other moneyed capital against capital invested in such shares, as is not consistent with the legislation of Congress. The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule that it is not absolute equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or equality of taxation cannot, in the nature of things, be expected or attained under any system. But as substantial equality is attainable, and is required by the supreme law of the land, in respect of State taxation of National bank shares, when the inequality is so palpable as to show that the discrimination against capital

invested in such shares is serious, the courts have no discretion but to interfere.

The Supreme Court of Pennsylvania, after referring to *Hepburn* v. *School Directors*, as having involved the same question that is now presented, and observing that the exemption is here as there only partial, says: "Not only is some other moneyed capital of a miscellaneous character taxable for local purposes, but all such capital of the same character as that which you desire to exempt; that is to say, the shares of State banks and savings institutions." Again: "The General Assembly has authorized the taxation of the shares of these banks in no other manner and at no higher rate than other capital of a similar character." If by this language it is meant that an illegal discrimination against capital invested in National bank shares cannot exist where no higher rate or heavier burden of taxation is imposed upon them than upon capital invested in State bank shares, or in State savings institutions, we have to say that such is not a proper construction of the act of Congress. Capital invested in National bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. As the act of Congress does not fix a definite limit as to percentage of value, beyond which the States may not tax National bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality. But unless we have failed to comprehend the scope and effect of the taxing laws of Pennsylvania, and unless the allegations of the bill be untrue, the present case is not of that class.

Our attention is called by counsel for the defendants to the fact that Pennsylvania derives, probably, her principal revenues from railroads, and therefore has good reasons to look to her interests as a Commonwealth in respect to such improvements. To this fact he refers the legislation which makes railroad securities liable to taxation for State purposes only, and exempts them from local taxation. Upon like grounds he defends the exemptions made, in respect of local taxation, in favor of the bonds and

shares of other corporations that pay an annual tax into the State treasury. It is quite sufficient in respect of such matters, to say that this court has no function to deal with the considerations of public policy which control that Commonwealth in the assessment of property for purposes of revenue. We have no duty beyond that of ascertaining the intention of Congress in its legislation, permitting the several States to tax the shares of institutions organized under National authority for the purpose of providing a National currency, secured by United States bonds. If the principle of substantial equality of taxation under State authority as between capital so invested and other moneyed capital in the hands of individual citizens, however invested, operates to disturb the peculiar policy of some of the States, in respect of revenue derived from taxation, the remedy therefor is with another department of the government, and does not belong to this court.

We are of opinion that upon the allegations of the bill the defendants should have been put to their answer. The facts may then disclose a case quite different from that made by the bill. What we have said relates to the case as now presented. The judgment must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Delano v. Butler.

Same v. Same.

(118 U. S. 634.)

Stock — increase — change of increase — rights and liabilities of shareholders — subscription — payment — discharge of liability.

Where a National bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it may reduce the amount of the increase to the amount actually paid.

Where a shareholder of a National bank subscribes to and pays for a certain increase of stock, and the bank afterward reduces the amount of the increase,

and he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the Comptroller of the Currency provided for in section 5205, U. S. Revised Statutes, he is estopped to deny his liability as a subscriber to the reduced amount.

The payment of an assessment imposed by a bank on its shareholders under section 5205, U. S. Revised Statutes, in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability under section 5151, U. S. Revised Statutes, for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares.

IN error to the Circuit Court of the United States for the District of Massachusetts.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The first case was an action at law in the Circuit Court of the United States for the District of Massachusetts, by Linus M. Price, as receiver of the Pacific National Bank of Boston, for whom Peter Butler has been substituted, against John P. Delano, a citizen of Bath, Maine, to enforce the personal liability of the defendant, under section 5151 of the Revised Statutes, upon an assessment of one hundred per centum of the par value of sixty shares of the capital stock of the Pacific National Bank alleged to be held and owned by said Delano at the time of the insolvency and suspension of said bank.

The Pacific National Bank was duly organized and authorized to do business as a National bank under the provisions embraced in title 62 of the Revised Statutes of the United States, and located in Boston, in October, 1877. Its capital stock was fixed at $500,000, paid in cash, with a right to increase it to $1,000,000. It continued business on this basis until September 13, 1881, when, as appears by the records of a meeting of the directors, held in Boston, it was "voted that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them."

On the same date a copy of the following notice was sent by the cashier to each stockholder of the bank:

"A. I. Benyon, President. J. M. Pettingill, Cashier.

"PACIFIC NATIONAL BANK, 105 DEVONSHIRE STREET,
BOSTON, *September* 13, 1881.

"At a meeting of the directors of this bank, held this day, it was 'voted that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.'

"Subscription to the new stock will be payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent per annum.

"J. M. PETTINGILL, *Cashier.*"

The whole amount of the increase of capital voted was not taken and paid in, nor was notice ever transmitted to the Comptroller of the Currency that all of such increase had been paid in; nor was that official's certificate of the increase to $1,000,000, with his approval thereof, ever issued. But $461,300 of the proposed increase to $500,000 was actually subscribed for and paid in as capital stock prior to November 18, 1881, and was used in the general business of the bank. On November 18, 1881, the bank became insolvent, suspended payment and closed its doors. On the same day Daniel Needham, an examiner of National banks, was placed by the Comptroller of the Currency in charge of the assets of the bank, for the purpose of ascertaining its condition, where he remained until March 18, 1882.

The directors of the bank met on December 13, 1881, during the period of suspension, and passed a vote that, as $38,700 of the increase of capital voted on September 13, 1881, had not been taken and paid in, that amount can be canceled and deducted from the capital stock of $1,000,000, and the paid-up capital stock fixed at $961,300; and that the Comptroller of the Currency be notified of the increase of $461,300, which had been paid in, and requested to issue a certificate of such increase according to law. Thereupon the Comptroller of the Currency, under date of December 16, 1881, made and issued the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF THE COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *December* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency, that the capital stock of the 'Pacific National Bank of Boston, Mass.,' has been increased in the sum of four hundred and sixty-one thousand

three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

"Now, it is hereby certified that the capital stock of the 'Pacific National Bank of Boston, Mass.,' aforesaid, has been increased as aforesaid, in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

[SEAL] "JOHN J. KNOX, *Comptroller.*"

No vote of the stockholders was taken relating to the increase or decrease of the capital stock of the bank.

Under date of December 16, 1881, the Comptroller of the Currency addressed the following letter to the bank:

"WASHINGTON, *December* 16, 1881.

"*The Pacific National Bank of Boston, Massachusetts:* The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred ($961,300) dollars having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name, and caused my seal of office to be affixed, to these presents, at the treasury department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL] "JOHN J. KNOX, *Comptroller of the Currency.*"

On January 10, 1882, during the suspension of the bank, the stockholders held their annual meeting (it being the first held since January 11, 1881), pursuant to the following notice duly published in the Boston *Daily Advertiser:*

"PACIFIC NATIONAL BANK.

"The annual meeting of the stockholders of this bank for choice of directors, and for any other business that may legally come before them, will be held at their banking-rooms, 105 Devonshire street, on Tuesday, January 10, 1882, at 11 o'clock, A. M. J. M. PETTINGILL, *Cashier.*"

At this meeting, after discussing the general condition of the affairs of the bank, the foregoing call of the Comptroller of the

Currency for an assessment of one hundred per centum on the capital stock of the bank was read. Thereupon the following was offered.

"Voted, in accordance with the notice of the Comptroller of the Currency, dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank, of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

"Voted, that the board of directors notify each shareholder of said assessment, and collect the same forthwith."

On the question of the adoption of the above a stock vote was ordered; the total number of votes cast was five thousand five hundred and forty-fiine, representing five thousand five hundred and forty-nine shares, of which five thousand four hundred and ninety-four were in the affirmative, and fifty-five in the negative. The amount paid in by the stockholders on this assessment was $741,800 prior to May 20, 1882.

The following notice to depositors was issued by the bank on March 16, 1882:

"THE PACIFIC NATIONAL BANK,
"BOSTON, *March* 16, 1882.

"*To our Depositors:* By vote of the directors, and the approval of the Comptroller of the Currency, the bank will reopen for business on Saturday, the 18th. Every effort has been made to put the bank again into a sound and solvent condition, and the stockholders have been called upon to pay an assessment of 100 per cent on their stock, thus making the depositors' balances secure and available. The bank will be run on strict business principles and in the interest of its customers and stockholders, and, while thanking you for past favors, we solicit your confidence and support for the future.

"LEWIS COLEMAN, *President.*
"E. C. WHITNEY, *Cashier.*"

Pursuant thereto the directors resumed active control of the bank and its assets on March 18, 1882, and again conducted a general banking business until May 20, 1882, when the bank ceased business, and the directors voted to go into liquidation. Thereupon Linus M. Price was appointed receiver by the Comptroller of the Currency under section 5234 of the Revised Statutes, and took charge of the assets and records of the bank.

During the period between March 18, 1882, and May 20, 1882, while the bank was carrying on business in its own name, the amount due depositors was reduced from $4,101,365.91 on the

former date, to $2,052,957.82 on the latter, $62,693.40 being due to new depositors. The amount of deposits made between the dates named was $2,338,617.21. New liabilities were contracted subsequent to March 18, 1882, amounting to $200,000, including the $62,693.40 due to new depositors.

The plaintiff in error owned thirty shares of stock in said bank prior to the vote of September 13, 1881, to increase the stock to $1,000,000. After that vote he received from the cashier of the bank a printed copy of the notice dated September 13, 1881, at the bottom of which he wrote a subscription for thirty shares of the increase of stock, and returned it to the bank. Three days after the passage of the vote he paid $3,000 for the thirty shares so subscribed, and received a receipt for $3,000 "on account of subscription to new stock," signed by the cashier of the bank. In October he returned the receipt to the bank, and received for it certificate No. 780 for thirty shares of the new stock, dated October 1, 1881. Plaintiff in error supposed at that time that the whole $500,000 increase of capital had been taken and paid in, and believed that the increase to $1,000,000 had been regularly and legally made. He did not attend the stockholders' meeting of January 10, 1882, and received no other notice thereof than seeing the call published in the Boston *Advertiser*. On January 12 or 13 he received notice of the assessment of one hundred per centum upon the stock of the bank, and after consultation, was assured by another shareholder and a director of the bank that if this was paid there could be no further assessment made on his stock; in consequence of which assurances he paid the assessment of $3,000 on January 20, and $3,000 on January 23, which were indorsed on the certificates under the dates of payment, being one hundred per centum on sixty shares of the stock.

Upon the trial the intervention of a jury was waived by consent of parties, and the cause submitted to the court, which found the foregoing facts, and rendered judgment September 8, 1885, in favor of the receiver for the amount claimed. On June 8, 1885, the appellant, Delano, filed a bill in equity in the Circuit Court of the United States for the District of Massachusetts, against Linus M. Price, receiver of the Pacific National Bank, the object and prayer of which were to enjoin the further pros-

ecution of the pending action at law, brought by the said receiver against him for the purpose of enforcing the alleged liability of the appellant on account of the assessment upon his said stock, on the ground that upon the facts as heretofore stated the voluntary payment made by the appellant of the one hundred per centum assessed to restore the lost capital of $961,300, and which had been applied to the payment of the creditors of the bank, constituted in equity, if not at law, a complete defense to the claim of the receiver as an extinguishment of his liability upon the assessment sued on.

This cause was heard upon the facts as heretofore stated, and a decree rendered, dismissing the bill for want of equity, from which the present appeal was taken and is prosecuted.

Geo. F. Hoar, and *Benj. N. Johnson*, for plaintiffs in error and appellants.

A. A. Ranney, for defendants in error and appellees.

MATTHEWS, J. Section 5151 of the Revised Statutes provides that "the shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The object of the action at law brought by the receiver of the Pacific National Bank of Boston, in which judgment was rendered against the defendant, the plaintiff in error, was to enforce his liability under that section of the statute. The object of the suit in equity, in which Delano was the complainant, was to restrain the prosecution of the action at law on the ground that, if his legal defenses failed, he had in equity performed and extinguished his obligation.

The questions arising upon the records of those cases in various forms, upon the facts already stated, may be reduced to three, which will be considered and disposed of in their order. The plaintiff in error in the action at law contends, as grounds for reversing the judgment against him, (1) that he was not, at the

time of the appointment of the receiver, or at any time, the holder of sixty shares of the stock of the Pacific National Bank, but was, in fact and in law, a holder of only thirty shares thereof. He contends that the attempt on the part of the directors and the Comptroller of the Currency in December, 1881, to fix the capital stock of the bank at $961,300 was contrary to law, and void; that the alleged thirty shares of new stock, on account of which he is sued, never had any legal existence, and that he, by virtue of his subscription in September, 1881, for thirty shares in the then proposed increase of capital from $500,000 to $1,000,000, and by his other acts, never became liable, on account of the debts of the Pacific National Bank, beyond his liability as the holder of thirty shares of valid stock. (2) That by his contribution in January, 1882, of an amount equal to the par value of all the stock ever held by him toward the fund, which was all used in the payment of the debts of the bank, the bank then being insolvent, he in law discharged his liability as a stockholder in said bank, and should therefore have judgment in his favor. (3) As appellant in the suit in equity, Delano alleges, as ground for reversing the decree dismissing his bill, that the contribution made by him on January 23, 1882, of an amount equal to the par value of the stock held by him toward a fund which was actually used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a satisfaction and extinguishment of his liability as a stockholder for the debts of the bank, if not at law. It is further contended by him, as an additional ground for equitable relief, that by the payment of the $3,000 upon the thirty shares of alleged new stock, which he claimed never had any legal existence, and on which therefore he never incurred any liability, he really contributed toward a fund actually used for the payment of the debts of the bank an amount equal to two hundred per centum of the stock held by him, which payment, if not available in his favor as a satisfaction of his statutory liability technically at law, nevertheless must be regarded in equity as a substantial equivalent, exonerating him from further liability.

The first question to be considered is whether there was a valid increase of the capital stock of the Pacific National Bank, of which the plaintiff in error became the owner of thirty shares, so

as to be charged with liability thereon as a stockholder. The articles of association of the bank provide that "the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars."

The eleventh section of the by-laws of the bank provides as follows: "Whenever an increase of stock shall be determined upon, it shall be the duty of the board to notify all the stockholders of the same, and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

Section 5142 of the Revised Statutes is as follows: "Any association formed under this title may, by its articles of association, provide for an increase of its capital, from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase, to be provided in the articles of association, shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

It is urged on behalf of the plaintiff in error that no increase of the capital stock of the bank was ever proposed by the directors, or assented to by the subscribers, except an increase of the full sum of $500,000; that no such increase as that was ever fully paid in, as required by the statute, and that no such increase was approved by the certificate of the Comptroller of the Currency; that his agreement of subscription was to take thirty shares of a new stock out of the whole sum of $500,000; that that agreement has never been carried into effect, and that he has never

consented to any modification of it; and that, consequently, whatever effect would be attributable to the acts of the directors or stockholders of the bank in conjunction with the Comptroller of the Currency, they are *res inter alios acta*, and not binding on him.

On looking at the terms of section 5142 of the Revised Statutes, it appears that three things must concur to constitute a valid increase of the capital stock of a National banking association. (1) That the association in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; (2) that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and (3) that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment.

In the present case the association did in fact finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency, by his certificate, approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question; for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency. The question therefore seeems to be converted into this: Whether the subscription of the plaintiff in error to a proposed increase of $500,000, and his payment thereof, can be held to be a binding agreement to accept thirty shares out of the reduced amount.

It will be observed, that without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did, in legal contemplation, with knowledge

of the law, which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors; and such payment, and acceptance of certificates in accordance therewith, might amount, under such circumstances, on his part to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in. But without insisting upon that point, or deciding it, we think that the subsequent conduct of the plaintiff in error amounts to a ratification, on his part, of the action of the association, and of the Comptroller of the Currency, in fixing the amount of the increased stock at the less sum.

After he paid his subscription and received his certificates of stock, he was called upon, as a stockholder, alleged to be the owner of sixty shares of the capital stock, to pay an assessment voluntarily imposed upon themselves by the stockholders at a regular meeting, at which the transaction of such business was not only legitimate, but necessary as a condition on compliance with which alone the association was to be permitted to resume and continue its business as a bank. The bank was in a condition of open and notorious insolvency. It was in the actual control of an examiner appointed by the Comptroller of the Currency, so far as lawful, for the express purpose of ascertaining its true condition in order to determine the question whether it might be permitted on any conditions, to resume business, or whether it should be required to go into liquidation by the appointment of a receiver to wind up its affairs. These facts were certainly known to the plaintiff in error, or, at any rate, were so notorious that he cannot be permitted to allege ignorance of them. A regular meeting of the stockholders was called by public notice, given in the usual form, for the election of directors, and the transaction of other business that might be brought before them. At this meeting official communication was made that, according to the determination of the association and of the Comptroller of the Currency, the increased and paid-up capital stock of the bank had been fixed at $961,300, and that the whole amount of it had been lost; that it was necessary to replace it by an assessment of one hundred per centum on the par value of all the shares in order to en-

able it to resume and carry on its business; and that otherwise it would be placed in the hands of a receiver, and required to go into liquidation.

Section 5205 of the Revised Statutes provides that "every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock by assessment upon the shareholders *pro rata* for the amount of capital stock held by each. * * * If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association according to the provisions of section 5334."

It was in pursuance of these provisions of the law that notice was given by the Comptroller of the Currency to the stockholders of the bank, at this, their regular annual meeting, that they must either assess themselves and pay in the whole amount of one hundred per centum upon their capital stock, fixed at the sum of $961,300, or, in the alternative, go into liquidation. In pursuance of this notice, in full view of the facts, and with a presumed knowledge of the law, the stockholders, by a vote that was almost unanimous, assented to the first branch of the alternative, and, as a condition for being permitted to resume business, voluntarily voted the required assessment. The plaintiff in error, it is true, was not present at this meeting, but he had notice of its proceedings, and, in pursuance of its vote, paid the full amount of the assessment imposed upon him as the holder of sixty shares of the capital stock of the company.

In our opinion, it is not open to him now to say that he made this payment in ignorance of the facts, or in ignorance of the legal right which he now seeks to assert to avoid the obligation. His payment was voluntary; it was made either with actual knowledge of the facts, or with such opportunity and means of knowledge as, by the exercise of common diligence, would have made him acquainted with the facts, and the payment made by him, in conjunction with his co-stockholders, was made upon a

distinct consideration whereby the bank in which he was interested was enabled to undertake anew its regular and active business. Such a course of action on his part must be construed to constitute a complete acquiescence in and ratification of the previous action of the association and the Comptroller of the Currency in reference to the increase of the capital stock; and he cannot be permitted now to deny that he thereby became, and has continued to be, an owner of sixty shares of the capital stock of the bank fixed at the increased sum.

This conclusion is not weakened by the suggestion made in argument that these proceedings of the bank took place during the period when its affairs were under the supervision of the Comptroller of the Currency, acting through the examiner. Notwithstanding the suspension of its business while under his control, the association continued its corporate existence, and was competent to exercise corporate functions. The increase of its capital, the vote of the assessment for the purpose of restoring what had been lost, and the acceptance of the alternative proposed by the Comptroller of the Currency to avoid going into liquidation, were all exertions of corporate powers which, under the circumstances, the statute expressly contemplated and authorized. It is therefore not all to the point, that its assets and affairs were subject to the supervision of the bank examiner. Nor is the conclusion affected by the other consideration, also urged in argument, that the attempt to revive the business of the bank by means of the assessment proved unsuccessful and abortive. The association, through its directors and stockholders, undertook the task, and entered upon its accomplishment, and in doing so materially changed its relations to its creditors. The failure to prosecute its business successfully, certainly cannot have the operation now claimed for it, of making illegal all that was done in the prosecution of the experiment. The hazard of failure must be presumed to have been in the contemplation of the stockholders when they consented to the risk, and the consequences of failure cannot now be shifted from themselves to their creditors.

The second ground of defense to the action at law is, in our opinion, equally untenable. The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their

lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under section 5205 of the Revised Statutes, is not the assessment contemplated by section 5151, by which the shareholders of every National banking association may be compelled to discharge their individual responsibility for the contracts, debts and engagements of the association. The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas, under section 5151, the individual liability does not arise except in case of liquidation, and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably. If the claim in the present case were allowed, it would follow that in every case payments made by stockholders for the purpose of restoring the impaired capital would be considered as credits on the ultimate individual responsibility of shareholders, and the whole efficiency of the provisions of section 5151 for the protection of the creditors of the company at the time of liquidation, would be destroyed. The obligations of the shareholders under the two sections are entirely diverse, and payments made under section 5205 cannot be applied to the satisfaction of the individual responsibility secured by section 5151. *Scovill* v. *Thayer*, 105 U. S. 143.

But it is said, in the third place, as the ground of relief under the bill in equity, that while this may be the result of a strict application of technical law, there remains to the complainant an equity which entitles him, by some process of substitution, to apply the payment which he has made under section 5205, to extinguish his liability under section 5151. So far as can be gathered from the allegations of the bill, the facts found and the argument of counsel, this equity is supposed to rest upon the facts that the money paid by the stockholders under the assessment was in fact

applied to the satisfaction of the debts of the bank; that such application was intended by the appellant when the assessment was paid; and that he paid it in the belief that it would exonerate him from further liability as a stockholder, induced by representations made to him to that effect by others interested in the affairs of the bank. Whatever hardship there may be in the circumstances of the case, we are unable to discover any ground of equitable relief. If the assessment was applied by the officers of the bank to the satisfaction of its debts, there is nothing to show that it was done ratably, as required by section 5151. The assessment was not paid by the stockholders for the purpose of effecting a liquidation of the affairs of the bank, but was understood to be the price paid for the privilege of continuing its business in the hope of saving their investment. If it was paid under a mistaken supposition that in the event of future failure, nothing more could be required of them, there is nothing to show that the shareholders were led into the mistake by any misrepresentations, either of fact or of law, on the part of the creditors for whose benefit the receiver is now acting. The mistake, if any, is one for which each shareholder is alone responsible.

On the whole we are constrained to conclude that the defenses at law and the alleged ground of relief in equity are alike insufficient, and that the judgment and the decree of the Circuit Court must be affirmed; and it is accordingly so ordered.

Whitney v. Butler.

(118 U. S. 655.)

Stockholders — individual liability — transfer of stock.

In an action against the executors of a deceased shareholder of a National bank to hold the estate liable for debts of the bank, which had become insolvent, it appeared that the defendants had, before the failure of the bank, sold the stock and received the pay for it, and surrendered the certificates and power of attorney for transfer to the president, who knew all the facts and the name of the purchaser, but who neglected to make the transfer on the books of the bank. *Held*, not maintainable.

IN error to the Circuit Court of the United States for the District of Massachusetts. The opinion states the case. The plaintiff had judgment below.

HARLAN, J. The plaintiffs in error are the personal representatives of Leonard Whitney, who, at the time of his death, held two certificates for fifty shares each of the capital stock of the Pacific National Bank of Boston. That bank suspended on November 18, 1881, and from that date until March 18, 1882, was in charge of an examiner of National banks. On the day last named, with the permission of the Comptroller of the Currency, it resumed business and so continued until May 20, 1882, when it failed, and was placed by that officer in the hands of a receiver to be wound up. At the time the receiver took possession, as well as when this action was brought, March 14, 1883, the above shares of stock stood in the name of Whitney on the books of the bank.

This suit was brought against the executors of Whitney, pursuant to the orders of the Comptroller of the Currency. It is based upon those provisions of the statute which declare that the shareholders of National banking associations shall be individually responsible, equally and ratably, and not for another for all contracts, debts and engagements, to the extent or amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and that estates and funds in the hands of executors of persons holding stock shall be liable, in like manner and to the same extent, as the testator would have been if living. Rev. Stat., §§ 5157, 5152. The assessment by the Comptroller upon shareholders to meet the bank's debts was for the full amount authorized by the statute.

The defendants insist that they were not shareholders of the bank and did not hold, nor were entitled to hold, any certificates of shares of its capital stock, either at the date of its suspension, or when the receiver was appointed, or when the assessment was made by the Comptroller. This defense was overruled, and the executors of Whitney were adjudged to be liable, the Circuit judge observing: "This being a suit brought by the receiver, who represents the creditors, and it appearing that the stock was

not transferred on the books of the company as provided by the by-laws, we think the defendants liable."

The question before the court is whether under the statute and the facts specially found, the defendants were liable to be assessed for the contracts, debts and engagements of the bank. The statute declares that the capital stock of a National bank shall be transferable on its books in such manner as may be prescribed in the by-laws or articles of the association — every person becoming a a shareholder by such transfer succeeding in proportion to his shares, to all the rights and liabilities of the prior holder. Rev. Stat., § 5189. The by-laws of this bank provide that its stock should be assignable only on its books, subject to the restrictions and provisions of the statute; that a transfer-book be kept, in which all assignments and transfers of stock should be made; that each certificate should state upon its face that the stock is transferable only on the books of the bank; and that when a transfer is made the certificate shall be returned and canceled, and a new one issued. Whether these by-laws were so far complied with as to release the defendants as executors from the liability imposed by statute, depends upon the effect to be given to certain acts of the executors and of the president of the bank in connection with the sale of the stock standing in Whitney's name.

It appears from the special finding of facts that Abner Coburn, of Maine, desiring to buy two hundred and fifty shares of the stock of this bank, made a special deposit in it of $25,000, to be applied for that purpose. This fact appears from a letter addressed to him by Benyon, the president of the bank, under date of September 21, 1881, in which the latter said: "Yours of 20th received with check $25,000, which we will use pending the purchase of our stock, and will hold on your account as a special deposit, securities to the same amount, till we succeed in making the purchase. This leaves the amount in your control until invested, and I trust will be satisfactory to you." That the stock might be obtained, Benyon secured the services of one Eager who had a deposit account with the bank, and that the latter might have money with which to buy the stock, Benyon placed to his credit, as a temporary loan, out of the funds of the bank, the exact amount required for the purchase.

On November 8, 1881, the defendants — having no reason whatever to believe that the bank was insolvent, or was about to become so, on the contrary, believing it to be solvent, and having no information as to Coburn's order — placed the certificates held by them in the hands of Day & Co., brokers, with directions to sell the stock. They also placed in their hands a power of attorney in the form usually adopted for transfers of stock. It was blank as to the names of the attorney and the purchaser, but was signed by the executors and duly witnessed. It was in these words:

"Know all men by these presents, that for value received, we, the executors of the estate of Leonard Whitney, of Watertown, do hereby make, constitute and appoint, irrevocably, ——— true and lawful attorney (with power of substitution), for and in our name and our behalf to sell, assign and transfer unto ——— one hundred shares, now standing in the name of L. Whitney, of Watertown, Mass., in the capital stock of the Pacific National Bank; and said attorney is hereby fully empowered to make and pass all necessary acts for the said assignment and transfer. Witness our hands and seals."

To that power of attorney was appended the following:

"For value received, I appoint, irrevocably, ——— as my substitute, with all the powers above given to me. Witness ——— hand and seal, ———, 187-. ——— ———. [Seal.]"

The other papers were the two certificates of stock and the certificate from the proper Probate Court, showing the appointment and qualification of the defendants as executors. Each stock certificate contained the following words:

"Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate."

On November 12, 1881, Day & Co. offered the stock for sale at public auction, and the same was at Benyon's request, bought by Eager at the sum of $10,400. Three days thereafter, November 15, 1881, Eager offered to the brokers in payment for the stock, his check on the Pacific National Bank. The bank at which the brokers did business declined to take that check in its deposit account. Benyon being informed of that fact, substituted for the check of Eager a cashier's check on another bank, which last check being paid, Day & Co., with the knowledge of Eager, delivered to Benyon, the president of the bank, the foregoing certificates of stock, with the power of attorney, the certificate from the Probate Court, and other papers — he thereafter holding the same "as

purporting to be security for, and as representing said loan, awaiting the filling of Coburn's order, with the design then to have the stock transferred to him as soon as his order had been filled." On the 16th of November the defendants received from the brokers the proceeds of the sale of the Whitney stock. Benyon obtained only fifty additional shares, for the purpose of filling the order of Coburn. All this happened before the bank suspended on November 18, 1881.

The executors of Whitney did not know by whom the stock was bought at the auction sale, unless the knowledge of the brokers is to be imputed to them. Believing in good faith, and having no reason to doubt that the purchaser had caused the transfer to be made, neither they nor the brokers took steps to ascertain whether it had in fact been done.

They had no knowledge or information until after the appointment of the receiver as to the purpose for which either Benyon or Eager held the before-mentioned papers on the stock.

While the bank did not purchase nor intend to purchase the stock for itself, its president, in execution of Coburn's order, procured Eager to buy this stock with funds furnished him for that purpose. Coburn did not take it; and the receiver, after he took possession, found the before-mentioned papers in an envelope purporting to represent a security for a demand loan to Benyon.

We do not think that the question arising upon these facts is concluded by any of the cases cited in the opinion of the Circuit judge (*Davis* v. *Society of Essex*, 44 Conn. 582; *Adderly* v. *Storm*, 6 Hill, 624; *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479, 483; *Johnston* v. *Laflin*, 103 id. 800, 804; *ante* 13; *Turnbull* v. *Payson*, 95 id. 418; *Brown* v. *Adams*, 5 Biss. 181), or in those cited in the brief for the receiver. *Davis* v. *Stevens*, 17 Blatchf. 259, *post*—; *Irons* v. *Manuf. Nat. Bank*, 27 Fed. Rep. 591;* *Bowdell* v. *Nat. Bank*, 2 Nat. Bank Cas. 146. In nearly all of them, where the issue was between the receiver, representing the creditors, and the person standing on the register of the bank as a shareholder, it is said generally that the creditors of a National bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements, and

* Reversed, *post* —.

contracts; that if a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it, and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is, that the deed is considered as recorded from the time of such deposit. 2 Washb. Real Prop., B. 3, chap. 4, ¶ 52. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register.

In the case before us the personal presence of the defendants at the bank was not required in order to secure their release from liability as shareholders. Besides the certificates of stock authorized them to act by attorney. Through their agents, the brokers, who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the president of the bank — he receiving them, with knowledge not only that defendants had parted with all title to

the stock and had been paid for it, but also that it had been purchased at public auction by Eager. He knew equally well that the surrender of the certificates and the delivery of the power of attorney and the certificate from the Probate Court could only have been for the purpose of having it appear, by means of a transfer on the books of the bank, that Whitney's executors were no longer shareholders.

The right to have the transfer made, and thereby secure exemption from further responsibilty, was secured to the defendants both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purposen ot to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows nothing was said or done by the bank's officers to raise a doubt in the minds of the defendants' agents that the transfer would be made at once.

It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had any thing occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would perhaps have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that

of careful, prudent, business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of National banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser.

For the reasons stated, the judgment is reversed, and the cause remanded, with directions to enter a judgment for the defendants.

Judgment reversed.

WILLIAMSPORT NAT. BANK v. KNAPP.*

(119 U. S. 357.)

Jurisdiction — Supreme Court United States — division of opinion — certificate — amount.

Under the acts of Congress authorizing questions arising on a trial or hearing before two judges, in the Circuit Court, and upon which they are divided in opinion, to be certified to the Supreme Court of United States for decision, each question certified must be one of law, and not of fact, nor of mixed law and fact, and it must be a distinct point or proposition clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other.

In an action of debt on sec. 5198, U. S. Rev. Stat., to recover twice the amount of interest, at the rate of nine per cent, received by a National bank in Pennsylvania, upon the discount of notes, where plaintiffs had judgment for $3,150.88, *held*, that this amount was insufficient to give jurisdiction to the Supreme Court of the United States.

IN error to the Circuit Court of the United States for the Western District of Pennsylvania.

* Reported below, 15 Fed. Rep. 333.

The original action was debt on section 5198 of the Revised Statutes, brought in the Circuit Court of the United States for the Western District of Pennsylvania, against a National banking association established within that district, to recover twice the amount of interest, at the rate of nine per cent, received by the defendant upon the discount of certain promissory notes. Section 5197 prohibits any such association from receiving upon such a discount a higher rate of interest than is allowed by the laws of the State in which the bank is established, except that where, by the laws of the State, "a different rate is limited for banks of issue organized under State laws," the rate so limited is allowed. The answer denied that the defendant owed the sums demanded, or had violated any provision of the National Banking Act.

The record showed that at the trial certain oral testimony, therein stated, was offered by the plaintiff in support of their allegations, was objected to by the defendant, the objection was overruled, and the defendant took exceptions. The record also showed that the defendant, for the purpose of proving, that at the time of the discounts in question, there were banks of issue, organized under the laws of Pennsylvania, allowed to receive interest on discounts at as high a rate as that received by the defendant, offered in evidence charters from the Legislature of Pennsylvania of a number of banks (the titles of which were given), some of which were thereby expressly authorized to receive interest at such rates as might be agreed upon by the parties; and also offered in evidence a number of other bank charters, in connection with evidence that some of the banks issued notes of circulation, commonly called bank notes, without special authorization of law, in order "to show that incorporated banks and banking companies in Pennsylvania issued notes of circulation, commonly called bank notes, under their respective general corporate powers, and not by virtue of any special authorization of law to issue such notes; and to show that incorporated banks and banking companies in Pennsylvania, not specially prohibited from issuing such notes, are banks of issue within the meaning of the act of Congress, by virtue of their incorporation and organization as banks or banking companies, and without any special authorization of law to issue such notes;" and the evidence so

offered by the defendant was objected to by the plaintiffs, and admitted subject to their exception.

The record further showed that a verdict was returned for the plaintiffs, and that the circuit judge and the district judge signed a certificate that they were opposed in opinion upon the following questions arising at the trial:

"*First.* Whether, under the evidence, the defendant was legally authorized to take, receive, reserve and charge on the loans or discounts made for the plaintiffs upon the notes, bills of exchange and other evidences of debt, offered and received in evidence on the part of the plaintiffs, at the rate of interest charged by the defendant and paid by the plaintiffs, as shown in evidence, to-wit: at the rate of nine per centum per annum.

"*Second.* Whether, under the laws of the State of Pennsylvania, a rate of interest or discount was limited for banks of issue, organized under State laws, at a rate equal to or exceeding that charged by the defendant to the plaintiffs, and whether the defendant was, under the evidence and the acts of Congress, allowed to take, receive, reserve and charge the rate so limited for the discounts made for the plaintiffs, to-wit: at the rate of nine per centum per annum.

"*Third.* Whether the decision of the Supreme Court of Pennsylvania, 'that there are no banks, nor have there been any such banks, in Pennsylvania, authorized to take and receive interest at a greater rate than six per cent,' is binding and conclusive upon the judgment of the courts of the United States in determining the construction and effect in Pennsylvania of the acts of Congress commonly called the 'Currency Acts,' and especially sections 5197 and 5198 of the Revised Statutes of the United States.

"*Fourth.* Whether, upon the whole evidence, the plaintiff was entitled to recover."

Judgment was rendered for the plaintiffs in the sum of $2,150.38, and the defendant sued out this writ of error.

Wm. H. Armstrong and *C. La Rue Munson*, for plaintiff in error.

H. C. McCormick and *H. C. Parsons*, for defendants in error.

GRAY, J. Assuming, what does not appear in the record, that the evidence stated in the bills of exceptions was all the evidence introduced at the trial and referred to in the certificate of division, that certificate is clearly insufficient to support the jurisdiction of this court. Under the acts of Congress, authorizing questions arising on a trial or hearing before two judges in the Circuit Court, and upon which they are divided in opinion, to be certified to this court for decision, it has always been held that each question certified must be one of law, and not of fact, nor of mixed law and fact, and that it must be a distinct point or proposition, clearly stated, and not the whole case, nor the question, whether upon the evidence the judgment should be for one party or for the other. *Saunders* v. *Gould*, 4 Pet. 392; *U. S.* v. *Bailey*, 9 id. 267; *Weeth* v. *New England Mortg. Security Co.*, 106 U. S. 605; *California Paving Co.* v. *Molitor*, 113 id. 609 615–617; *Waterville* v. *Van Slyke*, 116 id. 699–704.

Tested by these rules, the first and second questions certified, each being whether "under the evidence" the defendant was authorized to receive interest at a certain rate, as well as the fourth question, "whether, upon the whole evidence, the plaintiff was entitled to recover," are not questions which this court is required or authorized to answer.

The third question is equally irregular and insufficient. Instead of being clearly and distinctly stated, it is quite obscure and ambiguous; for it does not show whether the supposed decision of the Supreme Court of Pennsylvania, "that there are no banks, nor have there been any such banks, in Pennsylvania, authorized to take and receive interest at a greater rate than six per cent,' was based upon matter of law, or matter of fact, or both. The latest reported decision of that court, to which the learned counsel for the plaintiff in error referred to explain this question, affirmed a ruling of a lower court, that "in fact and in law, there is no bank of issue in Pennsylvania authorized to charge a rate of interest in excess of the legal rate;" and said nothing upon the question whether there ever had been any such banks. *Lebanon Nat. Bank* v. *Karmany*, 98 Penn. St. 65, 73, *post* —.

Neither the amount of the judgment below, nor the certificate of division, being sufficient to give this court jurisdiction, it nec-

sentations and all of them, the plaintiff complied with such requests of defendant, and did not undertake negotiations with, or offer rewards or other inducements to, such persons as aforesaid for the return of her said bonds and coupons, and permitted and authorized the defendant to act for her and in her behalf in the respects mentioned, and as requested, in such and any negotiations for the recovery of her said bonds and coupons, with the bonds, stocks, securities, and other property of the defendant and other owners and losers of said property as aforesaid.

"That thereupon the said defendant undertook to act in behalf of the plaintiff in the respects mentioned, and took certain proceedings and entered into certain negotiations with the persons who had taken said property, or possessed the same as aforesaid, for the recovery of the same; that some time during the years 1879 and 1880 the defendant, acting as aforesaid, recovered and received from said persons the greater part of said stolen property taken as aforesaid, on the 26th day of January, 1876, including a large amount of the separate property of the defendant, amounting in all, in face of par value, to about $1,500,000, and thereupon the defendant settled and compounded with said persons for all claims arising or growing out of such taking or robbery as aforesaid; that the difference between the amount of property so recovered and the amount of property taken or stolen on January 26, 1876, as aforesaid, and all the property so taken and not recovered, was by the defendant allowed and agreed to be retained by and released to the said persons as a consideration or reward for the restoration of the remainder as aforesaid; that among the securities and property so allowed and agreed to be retained, and so released by the defendant, were the eight bonds of the plaintiff, and all the coupons thereto belonging; that the plaintiff was not informed at the time by the defendant of the terms of said agreement or arrangement between the defendant and said persons, but all the proceedings of the defendant in those respects, and for the restoration of such property, were concealed from the plaintiff, and she has never consented to the action of the defendant therein.

"That by means of plaintiff's said property, together with other considerations, and by the total sacrifice of the plaintiff's said property, the defendant was enabled to recover, and did recover

as aforesaid, a large amount of its own property, and the property of its other depositors, and has reimbursed itself for the greater part of its losses in said robbery, and for the expenses which the defendant incurred in respect to the matters herein mentioned; that the defendant, not regarding its promises and undertakings, did not take due care of the plaintiff's interest as aforesaid, but, on the contrary, sacrificed the same for its own advantage, and so negligently and carelessly conducted itself with respect to the plaintiff's said property and interest, and took so little care thereof, that, by and through the mere neglect and improper conduct of the defendant and its servants, and by the willful neglect of plaintiff's said interests so committed to its charge, the plaintiff has wholly lost her said property;" for the value of which she accordingly asks judgment.

To this the defendant answered, admitting that securities to the amount in par value of about $1,600,000, belonging in part to the defendant and partly to its officers and other persons, were stolen from its vaults by armed burglars in January, 1876, and that among said securities were the bonds claimed by the plaintiff as plaintiff's property. The answer alleges that the bonds of the plaintiff, prior to the burglary, were held by the defendant in its vaults as a favor to the plaintiff, by permission of one of the defendant's officers, without the consent or agreement of the defendant, and were not on deposit with the defendant for any reward or consideration to the defendant, but were left on the special agreement made with the plaintiff that the bonds should remain at the risk of the plaintiff, and the defendant should in no case be responsible therefor; and alleges that it had no corporate power to make any contract or agreement, either with reference to the safe-keeping of the said bonds, or any such contract as that alleged in the complaint for their recovery, and that no such contract was in fact ever made, all the allegations of the complaint in that respect being denied. The answer further alleges that the defendant, "while having no duty or obligation to the plaintiff in the premises, nevertheless did use good faith and due care in all the transactions mentioned in the complaint, and the defendant committed no breach of trust, and was guilty of no breach of trust, fraud, carelessness or negligence whatever, in

any or all of said matters; but, on the contrary, defendant alleges that, at its own expense, defendant enabled plaintiff to recover four of the eight bonds for the value of which plaintiff here sues defendant;" and that the plaintiff's failure to recover back the remaining four of the eight bonds was caused solely by the carelessness and negligence of the agents employed by the plaintiff, and not by the defendant.

By a pleading subsequently filed, and called a "replication," the plaintiff admitted that since the commencement of the action she had recovered four of the bonds mentioned in the complaint by means of an action of replevin against one Henry G. Pearson, then the postmaster of the city of New York and reduced her claim accordingly.

The cause came on for trial by a jury, and the plaintiff, having introduced evidence to maintain the issues on her part, rested her case, when, on a motion of the defendant, the court instructed the jury to return a verdict for the defendant, which was done. Judgment was rendered thereon in favor of the defendant, to reverse which this writ of error is now prosecuted.

The question of law for our determination is whether there was sufficient evidence in support of the plaintiff's cause of action to require its submission to the jury.

The evidence offered by the plaintiff on the trial of the cause tended to prove the following facts.

The burglary occurred in January, 1876. Efforts were immediately made by the bank to recover the lost property; and about three weeks after the burglary, the officers and directors of the bank caused a meeting to be held at the bank of some of the losers, including depositors for safe-keeping. Plaintiff did not attend this meeting, and it does not appear that she was represented there. At that meeting directors and officers of the bank were present, and it was proposed to form a committee, composed of bank officers and depositors, to take measures to recover the stolen property. This was assented to by the bank's officers, but was voted down, and the matter left, as before, to the efforts of the bank.

In 1877 the plaintiff in error married Dr. Wylie, of New York, who thereafter acted for her in the matter. In the same year

Dr. Wylie was informed, through a patient, that he could deal with Scott, one of the burglars, for the recovery of Mrs. Wylie's bonds. He did not at once act upon this, because he understood the bank was acting for his wife. Shortly thereafter, Dr. Wylie stated this proposition to Warrener, the vice-president and manager of the bank, and that he thought he could get back his wife's bonds. Warrener then requested Wylie not to negotiate independently of the bank, and stated that the bank was negotiating to get the securities back. To this request Wylie acceded. On February 9, 1878, Wylie received from Hinckley, one of the prominent directors of the bank, a letter representing that he was acting for the bank, and inclosing the following paper, which he requested the plaintiff to sign: "We, whose names follow, having suffered the loss of securities by the robbery of the Northampton National Bank in January, 1876, hereby agree to pay a *pro rata* proportion of the expenses incurred in obtaining them, and returning them to us." Hinckley wrote again, February 27, 1878, as he says, at the request of Warrener and Edwards, the president, urging Mrs. Wylie to sign the paper, and saying that they thought the property could be recovered "cheaper in bulk than in detail," and that they had "strong hopes of being able to effect a negotiation at no distant day, and would like to make one clean job of it." Thereupon, on March 21, 1878, Mrs. Wylie and her husband signed the paper as requested, and returned it to the bank.

In October, 1877, Edwards, the president of the bank, was notified by persons acting in behalf of Scott and Dunlap, two of the burglars then under sentence, that $100,000 of the best bonds had been put aside, and money borrowed on them, and that the whole lot could be had for $8,000; whereupon efforts were made to effect this recovery. To the knowledge of Edwards and the vice-president, Warrener, and, upon consultation with them, Hinckley, was allowed however to separately negotiate, through the same channel, for the return of $25,000 Union Pacific railroad bonds, which were known to belong to him, on payment of $6,000. These $25,000 of bonds were a part of the $100,000 lot, and upon delivery were locked up, and the transaction concealed until June, 1878. After the $6,000 was paid, the difficulties of nego-

tiation increased, the persons holding the balance of $75,000 making exorbitant demands. While further negotiations for the $75,000 were proceeding, Hinckley, though acting as an officer of the bank for all parties concerned, and acting with Edwards and Warrener, again attempted to make his private bargain for $19,000 more of Union Pacific bonds supposed to be in the same lot. The return of the $19,000 was offered upon payment of $10,000 to the parties holding them, which offer was refused, the price being considered too exorbitant. Further attempts were made to secure the return of the remaining $75,000, but the holders of the securities refused all offers made for their return, and the whole $75,000 were sent to Europe and negotiated, or otherwise lost. On this subject Hinckley wrote to Dr. Wylie on May 10, 1879: "This I do know, that * * * no part of the $75,000 left the country until some time in 1878, after I refused to pay $10,000 for the balance, $19,000 of my U. P.'s. It was my refusing to pay that sent them abroad. If I had accepted the offer, I have no doubt we could have got the whole $75,000 at 50 per cent of the market value." Hinckley also wrote to Dr. Wylie: "The offer was a specific one for $25,000 U. P. S. F. bonds. It came from the thieves, not from me, or any one in my interest. If the offer had been to return the Missouri Pacifics, you would have been notified, and not I. Every effort was made to induce the holders to name a price at which they would return the $100,000, but to no purpose, although I have good reason to believe that, if I had accepted the second offer of 50 per cent of the market value, something might have been done."

In January, 1879, Dr. Wylie notified various bankers abroad of the theft of the bonds, and subsequently certain of the coupons from said bonds were presented for payment, of which the plaintiff was notified by the railroad company, and she replevied and recovered the same. It was then ascertained for the first time, in June, 1879, that the bank had not sent particulars of the robbery abroad further than that the robbery had occurred, and a list of the bonds stolen, but the numbers of the bonds were not given. Some circulars giving the numbers of the bonds and a general cable were sent to London, but no circulars were sent to Frankfort or elsewhere on the Continent.

In 1876 and 1877 indictments were found in Massachusetts against Scott and Dunlap, and also against Leary, Conners and Draper, for this burglary. Scott and Dunlap were tried and convicted at Northampton; the others had not then been caught. Afterward Draper was arrested and taken to Northampton, and remained there in jail untried about two and one-half years; shortly before the expiration of which time, in 1880, Conners and Leary were arrested and taken to Northampton jail. Negotiations were conducted between the bank and Scott and Dunlap, then in State's prison, and influence brought to bear upon them, for the return of the property, and they finally stated to one of the directors that Leary had control of it. After Leary was arrested, Scott and Dunlap wrote a letter to him, which resulted in the greater portion of the property being recovered soon after Conners was taken to Northampton. Hinckley and Warrener went to New York to a safe deposit company there, and brought it away. A little before or after this final recovery, Conners, Leary and Draper were all discharged at Northampton without trials. The amount of property stolen was recovered, except about $12,000 cash and $70,000 to $80,000 par value of bonds and securities. The bulk of the negotiable coupon bonds was recovered; also all non-negotiable bonds, and all negotiable securities except about $80,000.

Hinckley testified that a final recovery was not made by or through him, and not by or through the means mentioned in the 1878 and 1879 letters to Wylie. Every thing was futile until the final recovery. The bank or its officers did not agree that the plaintiff's bonds should be retained and released to the thieves, or any other person, as compensation for the restoration of the remainder. Of the coupons attached to the plaintiff's stolen bonds maturing prior to the commencement of this action, twenty-eight have never been recovered. These coupons were each for $30. The value of the plaintiff's bonds on January 31, 1882, was $1,080 for each bond, with unmatured coupons only attached. Of the plaintiff's bonds so stolen four have never been recovered by her.

The complaint in this case may be considered as embracing two distinct causes of action — the *first* founded on the alleged

negligence of the defendant in the original loss of the bonds, and the *second* on negligence alleged to have occurred in the execution of the agreement for their recovery.

It was decided in the case of *National Bank* v. *Graham*, 100 U. S. 699; 2 Nat. Bank Cas. 64, that it would "be competent for a National bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly." In the present case it is conceded that there is no evidence of negligence on the part of the bank resulting in the original loss by robbery, except the mere fact of the loss itself by that means. The plaintiff's case therefore upon this cause of action is without proof.

As to the second cause of action, the facts stated in the complaint seem to us to be sufficient, if proven, to constitute a legal liability on the part of the defendant. It would certainly be competent for a National bank to take measures for the recovery of its own property lost in the way described. If the loss, as in the present case, included the property of others, and it was deemed best, having reference to the bank's own interest, that these measures should be taken by the bank alone, for itself and all concerned, it might lawfully undertake to act for others thus jointly concerned with itself, as well as for itself alone; and want of proper diligence, skill and care in the performance of such an undertaking would be ground of liability to respond in damages for such failure. Much more would the bank be liable, in such a case, if, in the performance of such an undertaking, it used the property of the plaintiff for the recovery of its own. This, it is alleged in the complaint in this case, the defendant did. There is a total want of evidence to this effect, and that ground of complaint was very properly abandoned.

The plaintiff therefore must stand upon the remaining allegations, which may be reduced to two. (1) That the bank did not make such an agreement to act as the plaintiff's agent in the recovery of her property; and (2) that it was guilty of a want of due care and diligence in the performance of its duty as such, whereby the loss occurred. On both of these points we think there was no evidence to charge the defendant sufficient to require

it to be submitted to the jury. The meeting referred to in the evidence, called by the bank, of those interested with itself in the recovery of the stolen property, resulted in no such agreement. The bank had before that been taking such measures for that purpose in its own behalf, and incidentally for the others, as it deemed best. The proposal made at the meeting to put the matter in charge of a joint committee of the officers of the bank and individual losers was rejected. The bank continued thereafter to prosecute the matter as it had been doing from the beginning. The communications which subsequently took place between Dr. Wylie, the plaintiff's husband, and Mr. Warrener, the vice-president and manager of the bank, based on the information which the former had received from his patient that he could deal with Scott, one of the burglars, for the recovery of his wife's bonds, and the reply made by Mr. Warrener requesting him not to institute an independent negotiation, on the ground that it might interfere with the success of those which the bank was then prosecuting, do not tend to prove a contract by which the bank assumed to act as the plaintiff's agent in the matter which bound the bank to take any other measures than such as it was then pursuing, or which obliged the plaintiff not to undertake any separate negotiations of her own. At the most, it can be considered only as a friendly understanding, between two parties having like interests, in respect to the course deemed best for the interests of both.

But, even if it could be supposed that there was proof of a distinct agreement, such as is alleged, whereby the bank agreed, in consideration of the plaintiff's desisting from any separate efforts on her own behalf, to prosecute measures for the recovery of her property equally with that of the bank and others, there is still an entire failure of evidence to establish, as against the bank, any failure of performance on its part. It seems to have acted with promptness, with diligence, with skill and with success. The great bulk of the stolen property was in fact recovered through its exertions and instrumentalities. This recovery included one-half in number of the bonds lost by the plaintiff, and no part of the plaintiff's property was used or sacrificed to save what was secured.

The particular circumstance in regard to the recovery by Hinckley of his Union Pacific railroad bonds, which seem to form the chief matter of complaint on the part of the plaintiff, do not seem to us to warrant any inference against the bank. Hinckley, although a director of the bank, had an individual interest in the bonds, and the information which led to his negotiations, and the recovery of a portion of them, came to him directly, because he was the only owner of bonds of that description included in the loss. He was therefore allowed by the bank, without objection, to negotiate separately for their return. He recovered $25,000 by the payment of $6,000, but $19,000 additional he was unable to obtain, except upon payment of what he deemed to be an exorbitant demand, with which he was unwilling to comply. It is supposed that Hinckley's bonds were a part of the lot, amounting in all to $100,000; it is also supposed that this lot included some of the plaintiff's bonds; and it is also supposed, that in consequence of Hinckley's refusal to continue negotiations for the recovery of the remainder of his own bonds, the holders secretly sent them to Europe, where they passed into the hands of innocent holders, and became lost beyond recovery. But all this is mere matter of conjecture. There is absolutely in the case no evidence whatever, either that any part of the bonds of the plaintiff constituted a portion of this lot of $100,000, nor that they could have been recovered, either without Hinckley's interference, or if he had pursued his negotiations; nor that the bonds were sent abroad by reason of any thing done or omitted by him. Hinckley does indeed state, in a letter written by him to the husband of the plaintiff, that he had reason to suppose that the whole lot of $100,000 might have been purchased for fifty cents on the dollar; but no facts are stated as the ground for this opinion, and there is no proof beyond the conjecture itself. Neither is there any reason to conclude that the bank was responsible either for what Hinckley did or failed to do. There is no evidence to warrant the conclusion that any thing the bank could have done, beyond what was done, would have resulted more favorably to the plaintiff. In our opinion therefore the court below was justified in its ruling upon the evidence, instructing the jury to return a verdict for the defendant. The judgment is accordingly affirmed.

UNITED STATES v. NORTHWAY.

(120 U. S. 327.)

Jurisdiction — Supreme Court of United States — certificate of division of opinion. Embezzlement—indictment—willful misapplication—aiding cashier to embezzle—scienter—abstracting funds—alleging organization.

The judges of the United States Circuit Court may certify a division of opinion as to whether "either of the counts of the indictment charges the defendant with an offense under the laws of the United States."

Under the Revised Statutes of the United States, section 5209, punishing the *president*, cashier or *agent* of any National bank who shall embezzle or willfully misapply any of its funds, an indictment charging the defendant with committing the offense charged as *president and agent* is good.

Under that statute an indictment charging that the funds alleged to have been embezzled were at that time in the possession of the defendant as president and agent is good, and it is not necessary to allege that they had *previously been intrusted* to the defendant.

An indictment charging the president of the bank with aiding and abetting one alleged to be cashier to misapply the funds of the bank, need not charge that the president knew that such person was cashier.

Under the word "abstracts" in this statute, the offense of abstracting the funds of the bank need not be described in an indictment for the abstracting by the words used to describe larceny.

An indictment under the statute charging one with the offense as president of a certain National bank, "duly organized and doing business at the village of," etc., sufficiently states the organization under the National Banking Act.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Northern District of Ohio.

Solicitor-General Jenks, for plaintiff.

A. J. Marvin, *J. B. Burrows*, and *W. W. Boynton*, for defendant.

MATTHEWS, J. On the 23d of April, 1885, the grand jury for the Eastern Division of the Northern District of Ohio returned an indictment apparently founded upon section 5209 of the Revised Statutes, against Stephen A. Northway, as president and agent of

the Second National Bank of Jefferson, a National banking association. On July 13, 1885, the record was, on motion of the district attorney, remitted to the Circuit Court. There are fifty-nine counts in the indictment. All of these were quashed except counts two, twelve, fifteen, sixteen, twenty-eight, thirty and forty-six, to each of which the defendant interposed a general demurrer. This demurrer came on for hearing before the Circuit Court, composed of the circuit judge and the district judge for that district, who certify to us that on the hearing they were divided and opposed in opinion on the following questions: "(1) Whether either of said counts charges defendant with an offense under the laws of the United States; (2) whether the charging of the defendant with committing the acts therein charged against him as 'president and agent' did not vitiate said counts of said indictment; (3) whether under section 5209 of the Revised Statutes of the United States, it was necessary in the indictment to charge that the moneys and funds alleged to have been embezzled and misapplied, or either, had been previously intrusted to the defendant; (4) whether it is necessary, in charging said defendant with aiding and abetting Sylvester T. Fuller, cashier of said bank, as in counts sixteen, twenty-eight and forty-six, with the misapplication of the funds of said bank, to charge that the defendant then and there knew that said Fuller was such cashier; (5) whether said second count sufficiently describes and identifies the crime of abstracting the funds of the bank created by the act of Congress; (6) whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the National Banking Act, or to carry on the business of banking under a law of the United States."

Section 5209 of the Revised Statutes, under which this indictment appears to have been drawn, is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association,

with intent, in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

We proceed to dispose of the several questions certified to us in their order.

1. The question whether either of said counts charges said defendant with an offense under the laws of the United States, which is the first one certified, we decline to answer, for the reason that it is too vague and general, within the act of Congress authorizing certificates of this character and the repeated decisions of this court.

2. We are of opinion that charging the defendant, with committing the acts therein charged against him as "president and agent" did not vitiate the counts of the indictment in which that description is contained. The only grounds on which the contrary conclusion could be predicated are that the allegation is either too uncertain or is contradictory. The allegation is not uncertain, as it might have been if it had been "president or agent." In that case it might have been urged that as the offense was charged to have been committed by the defendant either as president or agent, it was uncertain in which of these capacities he was charged; for, although it might be said that a president is *ex officio* agent of the association, there may be many agents who are not president. Here the description is that he was "president and agent," and committed the offense charged in some capacity described by both terms. Neither is the description contradictory, because he may be both president and agent. There is no repugnance in the two characters. Even on the supposition that the statute means to make a distinction between the two offices of president and agent, there is nothing in the nature of either to prevent them both being held at the same time by one person, and the acts charged may, in contemplation of law, have been committed by him in both capacities. *A fortiori* may this be the case, if every president of such an association is to be held by virtue of his office to be also, within the meaning of the act, an

agent of the association. In that case the use of the words "and agent" would be mere surplusage in the indictment. Being already included within the meaning of the word "president," it does not add any thing to the description to introduce the words "and agent." This question is therefore answered in the negative

3. The twelfth count of the indictment charges that the defendant, with proper allegations of time and place, "was then and there president and agent of a certain National banking association, to-wit: 'The Second National Bank of Jefferson,' theretofore duly organized and established, and then existing and doing business in the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States; and the said Stephen A. Northway, as such president and agent, then and there had and received in and into his possession certain of the moneys and funds of the said banking association, of the amount and value of twelve thousand dollars to-wit, * * * then and there being the property of said banking association, * * * and then and there being in the possession of said Stephen A. Northway, as such president and agent aforesaid, he, the said Stephen A. Northway, then and there * * * wrongfully, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his, said Stephen A. Northway's own use," etc. The fifteenth count is for wrongfully, unlawfully and willfully misapplying certain described funds of the bank, with intent to injure the association, and without the knowledge and consent thereof, by paying and causing to be paid to certain persons, out of the moneys, funds, and credits then and there belonging to the property of the association, a large sum of money, in the purchase by him, the said Northway, for the use, benefit, and advantage of himself, of a large number of shares of the capital stock of certain stock companies. It is not alleged in this count that the moneys and funds so alleged to have been misapplied had previously come into the possession of the defendant by virtue of his office and character of president and agent. In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent.

This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the act by an officer or agent of the association. With respect to the fifteenth count, and other similar counts charging a willful misapplication of the funds of the bank, this allegation is omitted; that is, it is not alleged that the moneys and funds charged to have been misapplied had previously come into the possession of the defendant. Neither do we think this to be necessary to a description of the offense. A willful and criminal misapplication of the funds of the association may be made by an officer or agent of the bank without having previously received them into his manual possession. In the case of *U. S.* v. *Britton*, 107 U. S. 655, 669; *ante* 76, the offense of willfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a willful and criminal misapplication of the funds, as defined by section 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication evidently not embraced within the intention of section 5209. For that reason it was held in that case that it was necessary to specify the particulars of the application, so as to distinguish that charged in the indictment as willful and criminal from those others contemplated by the statute which were unlawful but not criminal; and it was held to be of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant, or of some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person. Now, if in addition it be necessary to the commission of the offense of willfully misapplying the funds of the bank that they should have come previously into the possession of the defendant in his official capacity, so that he could be said to have been intrusted with their possession, all distinction between the offenses of willfully misapplying the funds and of embezzlement would disappear. But

it is evidently the intention of the statute not to use the words "embezzle" and "willfully misapply" as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterward criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication. And when it is charged, as in the counts of this indictment, that he did willfully misapply certain funds belonging to the association by causing them to be paid out to his own use and benefit in unauthorized and unlawful purchases, without the knowledge and consent of the association, and with the intent to injure it, it necessarily implies that the acts charged were done by him in his official capacity, and by virtue of power, control and management which he was enabled to exert by virtue of his official relation. This, we think, completes the offense intended by the statute of a willful misapplication of the moneys and funds of a National banking association. We therefore answer the third question in the negative.

4. The fourth question is whether it is necessary, in charging the defendants with aiding and abetting Sylvester T. Fuller, the cashier of the bank, with the misapplication of its funds, to charge that the defendant then and there knew that said Fuller was such cashier. We answer this question in the negative. The counts in question charge Fuller with having made the misapplication of the funds of the bank as cashier. They further allege that the defendant, being president and agent of the association, willfully, knowingly, and unlawfully, and with intent to injure said banking association, before the misdemeanor was committed, "did aid, abet, incite, counsel and procure the said Sylvester T. Fuller, he, the said Fuller, then and there being cashier and agent as aforesaid, so as aforesaid to wrongfully, unlawfully and willfully misapply," etc. We do not think it is necessary, in an indictment for this offense, to charge any *scienter* more distinctly. The acts charged against Fuller could only be

committed by him by virtue of his official relation to the bank. The acts charged against the defendant likewise could only be committed by him in his official capacity. Both are alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the co-existence of this official relation on the part of both toward the same corporation. It is as cashier that Fuller was aided and abetted by the defendant in the commission of his offense. This allegation necessarily imputes knowledge of his official character.

5. The second count of the indictment is for the offense of abstracting the moneys and funds of the association. In substance, it charges that the defendant was president and agent of the Second National Bank of Jefferson, theretofore duly organized and established, and then existing and doing business, under the laws of the United States; and that the defendant, being president and agent as aforesaid, did then and there "willfully and unlawfully, and with intent to injure the said National banking association, and without the knowledge and consent thereof, abstract and convert to his, the said Stephen A. Northway's, own use certain moneys and funds of the property of said association, of the amount and value," etc. We see no reason to doubt the sufficiency of this description of the offense. It is true that the word "abstract," as used in this statute, is not a word of settled technical meaning like the word "embezzle," as used in statutes defining the offense of embezzlement, and the words "steal, take and carry away," as used to define the offense of larceny at common law. It is a word however of simple, popular meaning, without ambiguity. It means to take or withdraw from; so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which, under this section of the statute, is made the offense of criminally abstracting the funds of the bank. To constitute that offense, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it, or some other company or person, or to deceive some officer of the asso-

ciation, or an agent appointed to examine its affairs. All these elements are contained in the description of the offense in the count in question. The count is therefore sufficient within the decisions of this court upon similar statutes. *U. S.* v. *Mills*, 7 Pet. 138; *U. S.* v. *Simmons*, 96 U. S. 360; *U. S.* v. *Carll*, 105 id. 611; *U. S.* v. *Britton*, 107 id. 655; *ante* 76. Unlike the word "misapply," as used in the same section, the word "abstract" is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word "abstract," as used in the statute therefore has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning in framing an indictment under the section, which is not required in order to be sufficient, to contain more than those allegations which are necessary, when added to the allegation of abstracting, to complete the description of the offense intended by the statute. This the count in question sufficiently does. It is contended however on behalf of the defendant, that the offense of "abstracting" the moneys and funds of the bank under this section of the statute is exactly equivalent to the offense of larceny, and that it can only be technically and appropriately described by the words used to describe the offense of larceny. So that the charge should have been, "did abstract, take and carry away." The answer to this point, it seems to us, is twofold. If, as is contended, an analysis of the section of the statute demonstrates that the legislative intent was simply to describe the offense of larceny by an officer or agent of the bank of its funds, then there is no ambiguity or uncertainty in using the word "abstract" in the indictment, as used in the statute, fully to describe the offense charged; for, according to the argument, it can mean nothing else, and the Legislature, by substituting the word "abstract" for the words which are required technically to describe the offense of larceny, have justified the use of the same word in the indictment. But, in the next place, we do not admit the proposition that the offense of "abstracting" the funds of the bank under this section is necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi*, the intent to deprive the owner of

his property; but, under section 5209, an officer of the bank may be guilty of "abstracting" the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs. This extent may exist in a case of abstracting without that intent which is necessary to constitute the offense of stealing. We answer the fifth question therefore in the affirmative.

6. The sixth question is whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the National Banking Act, or to carry on the business of banking under the laws of the United States. The language of the indictment is that the defendant "was then and there president and agent of a certain National banking association, to-wit, 'The Second National Bank of Jefferson,' theretofore duly organized and established, and then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States." We do not understand the necessity of this question. The allegation seems to be perfectly explicit. The defendant is charged by virtue of his office as president and agent of a National banking association, to-wit, The Second National Bank of Jefferson, which, it is further alleged, had been theretofore duly organized and established, and was then existing and doing business under the laws of the United States. This can mean only that it was organized and established as a banking association under the act of Congress authorizing the organization and establishment of National banks, and that it was in existence and doing business at the time of the alleged offense as such National banking association, because it could not be organized and established and existing and doing business under the laws of the United States in any other capacity. This question is accordingly answered in the affirmative. These answers will be accordingly certified to the Circuit Court.

LEATHER MANUFACTURERS' NAT. BANK v. COOPER, JR.*

(120 U. S. 778.)

Removal of causes — Federal question.

The act of Congress of July 12, 1882, repealing inconsistent acts, and providing that the jurisdiction of suits in which a National bank should be a party should be the same as if it were a State bank at the same place, prevents the removal of a cause in which a National bank is a party from a State to a Federal court on the mere ground that it is a National bank.

IN error to the Circuit Court of the United States for the Southern District of New York.

Chas. M. Da Costa and *N. B. Sanborn*, for plaintiff in error.

John M. Bowers, for defendant in error.

WAITE, Ch. J. This is a writ of error brought under section 5 of the act of March 3, 1875, chap. 137 (18 Stat. 470), for the review of an order of the Circuit Court remanding a suit which had been removed from the Supreme Court of the county and State of New York. The suit was begun June 1, 1886, by William B. Cooper, Jr., a citizen of New York, against the Leather Manufacturers' National Bank, to recover a balance of account due from the bank to the firm of Ashburner & Co., which had been assigned to him. The bank was originally organized under the National Banking Act, chap. 106 (13 Stat. 99), on the 27th of May, 1865, and its corporate existence was extended May 27, 1885, under the act of July 12, 1882, chap. 290 (22 Stat. 162). Its place of business is in the city of New York, in the State of New York. Section 4 of the act of July 12, 1882, as follows:

"SEC. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States, and other acts having reference to National banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession; provided however that the jurisdiction for suits hereafter brought

*Affirming 29 Fed. Rep. 161.

by or against any association established under any law providing for National banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby repealed."

On the 23d of September, 1886, the bank presented its petition to the State court for the removal of the suit to the Circuit Court of the United States for the Southern District of New York, under the act of March 3, 1875, on the ground of its being a National bank, and consequently the suit was one arising under the laws of the United States. The cause was duly entered in the Circuit Court October 4, 1886, and on the ninth of the same month Cooper moved that it be remanded. This motion was granted October 22, because section 4 of the act of July 12, 1882, had taken away from National banks the right of removing suits under the act of 1875, on the ground of their being Federal corporations. To reverse that order this writ of error was brought.

The act of 1882 repeals in express terms "all laws and parts of laws of the United States" inconsistent with its provisions, and enacts that jurisdiction for suits thereafter brought by or against National banks, with few exceptions, "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States" doing business where the National bank "may be doing business when such suits may be begun." This was evidently intended to put National banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the courts of the United States. The first National Banking Act, that of February 25, 1863, chap. 58 (12 Stat. 681), provided, in section 59, that suits by and against banks organized thereunder might be brought in any "circuit, district or territorial court of the United States held within the district in which such association may be established." By the act of June 3, 1864, chap. 106, § 57 (13 Stat. 116), there was added to this, "or in any State, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." Both these pro-

visions were carried into section 5198 of the Revised Statutes by the amendatory act of February 18, 1875, chap. 80 (18 Stat. 320).

The removal of this class of cases from a State court to a Circuit Court was first provided for by the act of March 3, 1875, in that clause of section 2 which relates to suits "arising under the Constitution or laws of the United States," as construed in *Pacific Railroad Removal Cases*, 115 U. S. 1. Thus the Federal and State courts had concurrent jurisdiction for suits brought by or against National banks, and a suit of that character begun in a State court could be removed by either party to a Circuit Court of the United States, if the value of the matter in dispute exceeded $500, because, as a National bank is a Federal corporation, a suit by or against it is necessarily a suit arising under the laws of the United States. But the act of 1882 provided, in clear and unmistakable terms, that the courts of the United States should not have jurisdiction of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a State bank doing business in the same State with the National bank. The provision is not that no such suit shall be brought by or against such a National bank in a Federal court, but that a Federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there; for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a State bank in like situation with the National bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a National bank because of the source of its incorporation. A National bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States.

A suggestion was made in argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers' Nat. Bank* v. *Morgan*, 117 U. S. 96, decided by this court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind however appears in the record, and if it did, it would not authorize a removal. This is not that suit, and a case does not arise under

the laws of the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved.

A case is not removable because a colorable assignment has been made to give a State court exclusive jurisdiction. *Provident Sav., etc., Soc.* v. *Ford*, 114 U. S. 635, followed in *Oakler* v. *Goodnow*, 118 id. 43.

Order to remand is affirmed.

BLATCHFORD, J., did not take part in the decision of this case.

RICHMOND v. IRONS.*

(121 U. S. 27.)

Liquidation — fraud — bill for relief — amendment — parties — creditors' bill — changing parties — limitations — liability of stockholders — revival — transfer not on books — powers in liquidation — guaranty — interest — deposits — demand — costs — receiver — creditor not appearing.

A bill filed against a National bank and its president, H., alleged that the voluntary liquidation of the bank was fraudulent; that H. had fraudulently appropriated the funds of the bank; and prayed that all sales or transfers by the bank or its president be set aside. The evidence showed that certain of the stockholders had fraudulently conveyed their stock to H., receiving therefor property of the bank. The complainants amended their bill, bringing in all the stockholders, alleging a conspiracy between certain stockholders and H. to commit this fraud, and asking relief, and an accounting of the indebtedness of the bank, and the amounts due from the stockholders to the complainants under the National Banking Act. *Held*, that the allowance of the amendment was within the discretion of the courts.

The act of Congress of June 30, 1876, sec. 2, provided that when any National bank went into voluntary liquidation, the statutory liability of the stockholders could be enforced by a bill in equity, in the nature of a creditors' bill, brought by a creditor on behalf of himself and all other creditors. The original bill was brought before this section; but it was in force at the time of the amendment. *Held*, that the act warranted the amendment.

All the creditors having been permitted to join complainant, and the bill having been subsequently amended so as to allege expressly that it was made on behalf of complainant and all other creditors of the bank, *held*, not error, since under the original bill it would have appeared that there were other

*Reversing 27 Fed. Rep. 591.

creditors, and the distribution would have been to each creditor his proportionate share.

The statute of limitations ceased to run against all creditors who came in under the bill, at any time.

Under the National Banking Act, the individual liability of the stockholder survives as against the personal representatives of a deceased stockholder.

A stockholder sold certain stock several months before the insolvency of the bank, but the transfer was not made on the books till the date of the bank's failure. *Held*, that the stockholder incurred the statutory liability.

After the bank went into voluntary liquidation, several creditors took in payment of their claims paper belonging to the bank, with the bank's guaranty of payment, which paper was not paid. *Held*, that such creditors were not entitled to distribution of the assets obtained by enforcement of the statutory liability of the stockholders, because the bank, after liquidation, could not guarantee payment.

Interest on the contracts, debts and engagements of the bank may be allowed as against the stockholders.

The book accounts of depositors draw interest from the date of suspension.

The master allowed twenty per cent of the amount of the debts, for expenses of the receiver, appointed under the original bill, against the stockholders. *Held*, error.

It was error to charge the stockholders with claims of persons who failed to appear and prove their claims.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

H. B. Hurd, *Henry G. Miller* and *M. W. Fuller*, for appellants.

Edward G. Mason D. J. Schuyler, for appellees.

Jas. H. Roberts, for Ira and Edgar Holmes.

MATTHEWS, J. The original bill in this case was filed February 3, 1875, by James Irons, the defendants being the Manufacturers' National Bank of Chicago, organized under the National Banking Act, and Ira Holmes, its president. The bill alleged that the complainant had recovered a judgment against the bank for the sum of $12,408.51 damages, besides costs, an execution on which had been returned unsatisfied; that on or about October 11, 1873, the bank had suspended payment and business, and in pursuance of section 44 of the Banking Law, had gone into vol-

untary liquidation, its affairs having been put into the hands of the defendant Holmes, its president, for that purpose; that the defendant Holmes had thereafter settled a large amount of the indebtedness of the bank by giving notes, made by him as president of the bank, and guaranteed by him as such, and by using the assets of the bank in payment of its indebtedness; that he had also converted and appropriated to his own use an amount of the assets of the bank charged to be not less than $250,000; that he also had in his possession and control a large amount of the personal and real property purchased with the funds and moneys of the bank, but which he had fraudulently withheld and disposed of for his own use; "that the said voluntary liquidation aforesaid, and the proceedings thereunder by the said defendant Holmes, were a pretense and sham, and were suggested, instituted and carried on for the sole and only purpose of concealing and covering up the transactions of the said bank and of dissipating and disposing of its assets in such a way and manner most agreeable to the wishes and interests of the said defendant Holmes and those in his interest, and in fraud of the rights of your orator and the other creditors of the said bank;" that the capital stock of the bank actually paid in amounted to the sum of $500,000, owned by twenty-four stockholders, a schedule of the names of whom, with their respective places of residence, and the number of shares owned by each, are set out in an exhibit to the bill.

The bill prays for a discovery under oath of "what moneys, cash, notes, bills receivable, United States bonds and other property and effects the said bank had in its possession and was the owner of at the time of the said snspension thereof, and at the time the same went into voluntary liquidation in the manner as aforesaid, or what moneys, cash, notes, bills receivable, United States bonds and other property the said bank has since had in its possession or control, or been the owner of, or the said Holmes, as president thereof or otherwise, has since had in his possession or control belonging to the said bank, and what disposition, payment, sale or transfer has been made of the property and effects of the same, and every part thereof." It also prays that all sales and conveyances made by the bank or by the defendant Holmes of property belonging to the bank may be set aside as fraudulent,

and that all the property and effects of the bank in its possession, or in the possession of Holmes, may be delivered up into the possession and control of the court, and applied, so far as necessary to the payment of the complainant's judgment; that the defendants may be enjoined from making any further transfers of the property of the bank; and that a receiver may be appointed of all the property and effects of the bank, and for general relief.

At various times subsequent to the filing of the bill, other judgment creditors of the bank filed petitions for leave to be made parties, and were allowed to join in the bill as co-complainants. On the 12th of February, 1875, the defendants interposed a demurrer to the bill. The grounds of demurrer were, among others, that a creditors' bill in behalf of one or more creditors would not lie, because the assets must be equally distributed among all; that a receiver of a National bank could only be appointed and the assets distributed by the Comptroller of the Currency under the act of Congress, and that the court had no power to enjoin a National bank from disposing of its assets in voluntary liquidation. On the 26th of February, 1875, the demurrer was overruled, and Joel D. Harvey was appointed a receiver, with full power and authority to take and receive possession and control of all the property of the bank, with directions to collect and convert the same into money, to be applied according to the order and direction of the court. On the 1st of April, 1875, the defendants filed a joint and several answer to the bill. They admit that the bank went into voluntary liquidation on September 26, 1873, and between that time and the time of filing the bill, that it settled a large amount of its indebtedness, so that there remained due to its depositors only $39,000; and alleges that these settlements were made mainly by paying out to creditors the assets of the bank — in some cases the defendant Holmes giving his personal obligations, which in a few instances were indorsed by him as president of the bank. The defendant Holmes denies all the fraud charged in the bill, and particularly that he had converted and appropriated to his own use any of the assets of the bank, and denies that he has any of such assets in his possession or under his control, and alleges, on the other hand, that he had given his private obligations in payment of the debts of the bank, which had

more than exhausted all his resources and brought him into a state of bankruptcy.

The said Holmes, as president, and for himself personally, also avers in the answer "that, at the time said bank went into voluntary liquidation as aforesaid, he verily believed that said bank and himself were solvent, and would be able to pay their debts in full by making settlement with the creditors to their satisfaction, and they these defendants, so believed, while making said settlements; and he was advised by his attorneys, and so believed himself, that all settlements made with the creditors of said bank in the manner aforesaid, pursuant to said forty-second section of the National Banking Act, would be valid, and that both said bank and its creditors so settled with would be protected, and that said settlements could not be set aside, or in any manner interfered with; that acting upon this advice, and what he believed to be the unquestioned law in the premises, said bank and its creditors, believing that they were within the letter and spirit of said section of the Banking Act, effected settlements to the amount of about $900,000, aside from reducing its capital stock to $178,000, and these defendants now claim that said settlements are all valid, and cannot be inquired into."

On October 5, 1876, leave was given the complainant to file an amended bill, making additional defendants; and it was filed on the same day. The amended bill alleges that the bank suspended payment on September 22, 1873; that it had been previously, and ever since has continued to be, insolvent; that the complainant was a creditor by judgment, as stated in the original bill, on which execution had been returned unsatisfied; that the bank, after suspending payment, went into voluntary liquidation under the management of the defendant Holmes, who settled a large amount of the indebtedness of the bank, so as to reduce it to about $40,000. The amended bill then sets out the names of the various stockholders of the bank, with the amount of shares owned by each, and alleges that while the bank was contemplating insolvency, and was in fact insolvent, and after the suspension of payment, certain of the persons named as stockholders, and who were also made defendants, combining and confederating with the defendant Holmes, surrendered and delivered up to

him, the said Holmes, the certificates of shares of stock held by them respectively, on some pretended contract of purchase, the same having been purchased with the money and assets of the bank, and canceled at the request and by the direction of the said stockholders, for the avowed purpose of releasing them, and each of them, from any personal liability on account thereof to the creditors of the said bank; but that nevertheless the same were never in fact canceled or transferred on the books of the bank, but now stand on said books in the names of the said defendants; and it is charged that the said pretended purchase and attempt at cancellation of the said stock was a fraud upon the complainant and the other creditors of the said bank, and should be set aside.

The bill accordingly prays for a discovery from the defendants of the facts in relation to the said transactions, and that the same may be set aside and decreed to have been made in fraud of the rights of the complainant and the other creditors of the bank; and "that the said stockholders, and each of them, be subject to the liability created by the statute thereon in the same manner and to the same extent as though such sales, transfers or surrenders had never been made; and that the said stockholders, or such of them as have sold, transferred or surrendered, or pretended to sell, transfer or surrender," etc., "the shares of stock so as aforesaid held and owned by them at the time the said bank suspended payment, in the manner as aforesaid, may be decreed to hold the moneys, property and effects received by them for said stock, in the manner as aforesaid, in trust for the creditors of the said bank, and, upon the respective amounts being ascertained, that they be decreed to pay the same to creditors thereof, or to such person or persons as your honors shall order and direct." The bill also prays "that an account be taken of the amount due from each of the said defendants to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the act under which the said bank was organized, and by which the liability of the stockholders thereof is fixed and determined; that a full and complete and accurate

account be taken of all the sales, transfers or surrenders, or pretended sales, transfers," etc., "of stock made by the said stockholders of the said bank, or any of them, after the same suspended payment in the manner as aforesaid, and to the amounts received by them respectively for any such sales, transfers," etc., "and that they may be decreed to hold the same in trust for the creditors of said bank in the manner as hereinbefore prayed, and that upon such accounts being taken the said defendants, or such of them as shall be found liable to your orator and the judgment and other creditors of the said bank upon the said stock liability created by the said banking act, and such of them as shall be liable for the amounts received by them for the sales and transfers of stock so made by them in the manner as aforesaid, be decreed to pay whatever amount shall be due from them, and each of them respectively, into court, or to the receiver duly appointed by said court, and that out of the fund so created your orator's judgment be paid in full, and the balance thereof be distributed among the other creditors of said bank in such way and manner as your honors shall direct."

All of the defendants named in the amended bill within its jurisdiction were served with process and appeared. On behalf of certain of these defendants a motion was made to strike the amended bill from the files, and others filed demurrers, for the reason, in substance, that it made a new case, different from that set out in the original bill, and inconsistent with it, containing matters and asking relief that could only be properly obtained by an original bill.

On the 9th of May, 1877, the complainant James Irons having died, a bill of revivor was filed in the name of his personal representatives. On October 1, 1878, the motion to strike from the files and the demurrers interposed to the amended bill were overruled, and the defendants required to answer. Subsequently, answers were filed at various times by the several defendants who appeared, the contents of which it is not necessary here particularly to notice, except to say that issue was joined by replication duly filed. On July 23, 1883, on the final hearing, the complainant had leave to amend, and did amend, the amended bill of complaint so as to allege expressly that it was filed on behalf of

himself and all other creditors of the Manufacturers' National Bank of Chicago; the prayer being amended so as to require an account to be taken of the amount due the complainant and other creditors of the defendant, striking out those parts which asked that the complainant's judgment be decreed to be a first lien on the property of the bank, and paid first in full out of the fund for distribution, and adding a prayer that the fund so created might be distributed among all the creditors of said bank *pro rata*, in such a way and manner as should be directed. To this amended bill, as finally amended, various defendants filed several answers *instanter*, setting up by way of a bar to the relief prayed for against the defendants, as holders of the shares of stock in the banking association, the statute of limitations of five years of the State of Illinois, and also insisting that the bill as amended was multifarious and inconsistent, because it prayed for further and different relief from that authorized by the act of Congress approved June 30, 1876. On the same day a decree was entered in the cause, which finds, among other things, as follows: That the Manufacturers' National Bank of Chicago became insolvent and suspended payment September 22, 1873, and in pursuance of the act of Congress went into voluntary liquidation on September 26, 1873; that debts of the bank are still due and unpaid; that at the time of the bank's insolvency and suspension of payment the capital stock of the bank consisted of five thousand shares, of the par value of $100 each, setting out the names of the owners thereof, with the number of shares owned by each; that after the said bank had become insolvent and suspended payment, certain shareholders of said bank transferred the stock held by them, but that all and each of such transfers were and are in derogation of the rights of creditors, and were and are invalid; and that certain named defendants, shareholders of said bank, setting out their names, are individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of the bank to the extent of the amount of stock standing in their names, respectively, on the 23d of September, 1873, and before any transfers were made that day, at the par value thereof, in addition to the amount invested in such bank. The death of a defendant, William H. Adams, on the 5th of June, 1882, was sug-

gested, and Elizabeth Adams, his executrix, made a party defendant in his stead.

By an order entered May, 7, 1879, the case was referred to Henry W. Bishop, Esq., a master in chancery, to take proof and report — *First*, the amount of the debts of said bank still unpaid and the amount due each creditor thereof; *second*, the value of the assets, if any, of the bank; *third*, the amount of assessment necessary to be made on each share of the capital stock of said bank in order to fully pay the indebtedness of the bank and the amount due and payable from each shareholder upon such assessment.

On the 6th of January, 1875, the master reported his findings under the decree of July 23, 1883. He reported the amount of the debts of the bank unpaid as of the 1st of November, 1884, to be $368,971.50; the name of each creditor and the amount due him being set out in a schedule. The claims of these creditors are also classified by the master as follows: (1) For clerical services to the bank, $183.31; (2) for past services of the receiver and his attorneys, $4,437.04; (3) claims arising before the failure of the bank, upon which no collaterals were taken, $179,231.81; (4) claims arising before the failure of the bank on account of which worthless collaterals had been subsequently received, $185,119.34. The master further reported that there were no assets of the bank outside of the stockholders' liability, and that the amount of assessment necessary to be made upon each share of the capital stock of the bank, in order to fully pay the indebtedness, was ninety per cent. A schedule attached to the report gives the name of each stockholder, and opposite his name the number of his shares of stock in the bank, the par value thereof, the per cent of assessment to be levied thereon, and the amount due and payable from him upon such assessment. These stockholders were also classified as embracing (1) stockholders who had been duly served with process or entered their appearance in the cause; (2) stockholders who had obtained a discharge in bankruptcy and were not liable to stock assessments on that account; and (3) stockholders who reside outside the jurisdiction of the court and have not been found within the district.

On February 2, 1885, various exceptions were filed on behalf of the defendant stockholders to this report of the master. An exception thereto was also filed on behalf of the receiver and creditors, so far as it reported in favor of certain stockholders claiming to have been discharged from their liability by their certificates in bankruptcy. Upon the hearing of these exceptions the court referred the cause again to the master to compute, from the proofs already taken in the cause, (1) the indebtedness of the bank at the time of the failure; (2) subsequent actual payments upon indebtedness; (3) net amount of indebtedness, with interest on same at the rate of six per cent per annum, from the time of the failure of the bank; (4) the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership. In pursuance of this direction, on the 25th of May, 1886, the master made a supplemental report, in which he finds that the indebtedness of the bank at the time of the failure thereof, to-wit: the 23d day of September, 1873, amounted in the aggregate to the sum of $410,064.10; that the subsequent actual payments upon said indebtedness amounted to the sum of $213,018.46; that the net amount of the indebtedness was the sum of $197,045.64; that the interest upon said last-mentioned sum from the 23d of September, 1873, when the bank failed, down to May 21, 1886, at the rate of six per cent per annum, is the sum of $149,686.98 — making the total unpaid indebtedness of said bank on the last-mentioned date the sum of $346,732.62; that twenty per cent upon said last-mentioned sum, amounting to the sum of $69,346.52, is necessary to be added thereto for the expenses of the receivership, making a total sum of $416,079.11; and that the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership, is eighty-three and two-tenths per cent upon the capital stock of $500,000.

In addition to those filed to the original report, exceptions were filed to the supplemental report, objecting to the allowance of interest upon the claims of the creditors, and to the addition of twenty per cent to the amount of the indebtedness, for the purpose of providing for the payment of the expenses of the receivership. All the exceptions to the master's reports were over-

ruled, and a final decree was entered against the defendants according to its findings; a decree being entered against each stockholder defendant severally for the amount computed to be due from him upon the assessment of the stock ascertained to be standing in his name on the books of the bank at the date of its suspension, at the rate of assessment fixed in the report of the master. From this decree Alonzo Richmond, Charles Comstock, Thomas Lord and William Henri Adams, administrator *de bonis non* of the estate of William H. Adams, deceased, severally appealed. Some of the questions raised by the assignments of error are common to all the appellants, and others are peculiar to the individual cases. So far as necessary to the disposition of the case, they will be considered in their order.

The first assignment of error relates to the pleadings. It is objected that the court erred in permitting the complainant to file the amended bill of October 5, 1876, and also in permitting the amendment made at the hearing on July 23, 1883; and we are asked to reverse the decree on that account, and on remanding the cause, to direct that the amended bill as amended be dismissed. The grounds of objection to the amendments as made are (1) that the amended bill stated a case entirely different from that contained in the original bill; and (2) that it made the bill, as amended, multifarious. The changes made in the case as originally stated in the bill are alleged to be (1) that it converted a creditors' bill, the object of which was to subject to the payment of the complainant's judgment assets of the corporation which could not be reached at law, into a bill for the additional purpose of enforcing the statutory liability of the stockholders of the bank to answer for its contracts, debts and engagements; and (2) that it converted the bill filed by the complainant in his own right into a bill on behalf of himself and all other creditors of the corporation.

It is a mistake however to assume that the bill as originally filed was strictly and technically a creditors' bill merely, for the purpose of subjecting equitable assets to the payment of the complainant's judgment. That undoubtedly was a part of its purpose and prayer, and in pursuance of it a small amount of the assets of the bank were recovered by the receiver, converted into

money, and applied to the payment of the costs in the cause; but the whole of this recovery amounted only to $3,346.96, and it was not until after the result became manifest that application was made, and leave given, to file the amended bill. But the main purpose of the bill as originally framed was to obtain a judicial administration of the affairs of the bank, on the ground that its capital stock and property was a trust fund for the benefit of its creditors, the company being insolvent and in liquidation, and that, under the management of its officers and directors, this trust was being violated and perverted. The bill contained allegations that Holmes, the president and manager of the bank, had converted its assets to his own use and to the use of others, in violation of his trust and in fraud of creditors, applying the assets of the bank so as to prefer some creditors over others, and otherwise dissipating and squandering them. It accordingly prayed for a full discovery of all the transactions on the part of Holmes in reference to the affairs of the bank since its suspension, for an injunction prohibiting any further transfers of its assets, for the appointment of a receiver with the general powers of receivers in like cases, and for general relief.

If this bill had been prosecuted, as originally framed, to final decree, and had resulted in the recovery of assets of the bank applicable to its purposes, it would necessarily have been made to appear during the progress of the suit that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of having reduced his claim to judgment, or by reason of having first filed a bill to enforce the trust. In the case of an insolvent corporation thus brought into liquidation, and wound up by judicial process at the suit of a creditor, whether he sues in his own right, or on behalf of himself and other creditors, the rule of distribution is the same, and is founded upon the principle of equality in which equity delights, unless a claimant or some other judgment creditor had, previously to the filing of the bill, ob-

tained a lien at law upon some portion of the property distributed, or could establish a superior equity, existing at the time of the filing of the bill. *Curran* v. *Arkansas*, 15 How. 304; *Wood* v. *Dummer*, 3 Mason, 308; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 387; *Sawyer* v. *Hoag*, 17 Wall. 610.

When the amended bill was filed the resources of the bank discovered and delivered to the receiver had been exhausted. The amended bill set out the names of all the stockholders and all of those claimed to have been stockholders at the date of the suspension, by name, with the number of shares belonging to each. It charged that certain of them combined and confederated with the defendant Holmes for the purpose of committing a fraud upon the creditors of the bank, by surrendering and transferring their shares of stock, receiving in exchange therefor a portion of the assets of the bank applicable to the payment of its debts. It accordingly prays, as a part of the relief, that these transactions may be inquired into and set aside; that the assets of the bank so received by any of these stockholders may be decreed to be delivered up and applied to the payment of the debts of the bank; and that, in addition thereto, an account be taken of all the present indebtedness of the bank, and of the amounts due from each of the defendants "to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the act under which the said bank was organized, and by which the liability of the stockholders thereof is fixed and determined."

In some respects it is quite true that this amended bill is a departure from the case as stated in the original bill. It was however germane to the original bill to have included in it the statements of the amended bill in respect to such of the stockholders as were charged by name with having, in combination with the president of the company, sold their stock, receiving assets of the bank in payment therefor, after it had gone into liquidation, or in contemplation of insolvency, and in fraud of the creditors. Assets of the bank received by any of them in such circumstances were such as were clearly within the purview of the bill as

originally framed, and those allegations were certainly the subject of a proper amendment. Having thus brought in a number of the stockholders properly as defendants, to subject them to a decree to account for assets of the bank received by them in breach of trust and in fraud of creditors, it does not seem inappropriate or foreign to the general purposes of the bill for the court, having jurisdiction over them in behalf of the complainant, who, as we have seen, necessarily represented all creditors entitled to share in the results of the suit, to proceed upon the basis of granting the additional and complete relief prayed against them as stockholders, requiring them to answer under the statute for all the contracts, debts and engagements of the bank. But to do this made it necessary to bring in all other stockholders of the bank within the reach of the process of the court, although they may not have been charged as participating in the alleged breaches of trust and frauds. The various matters therefore contained in the amended bill and the original bill, were thus connected with each other in such a way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. In reviewing the exercise of that discretion on this appeal, we should not feel justified in any case in reversing the action of the Circuit Court, if it appeared that the appellants were not put to any serious disadvantage or materially prejudiced thereby. The amendment made at the hearing, whereby the amended bill was changed so as to state that it was filed by the complainant on behalf of himself and all other creditors, we regard as purely formal, and properly permitted for the purpose of making the bill explicitly to conform to all that had taken place previously in the progress of the cause. The litigation had been conducted, from the time of the filing of the first-amended bill, upon the supposition and theory that it included in its scope all creditors of the bank alike. The defendants therefore could not have been taken by surprise by the amendment, and would not be deprived of the benefit of any defense, or put to any disadvantage, on account thereof.

The action of the Circuit Court, in permitting these amendments, we think is justified by the rules on that subject as stated by this court in the case of *Neale* v. *Neale*, 9 Wall. 1; in *The*

Tremolo Patent, 23 id. 518; and *Hardin* v. *Boyd*, 113 U. S. 756. In the last-mentioned case it was said (page 761): "In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly, great caution should be exercised when the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted when it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."

By the original National Banking Act (section 5151 of the Revised Statutes) it was declared that "the shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for another for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." By section 5220 it was also provided that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." But no provision is contained in the original act specifying what course may or shall be taken, in case of voluntary liquidation, to enforce the individual liability of the shareholders. It is provided by section 5234 that when the Comptroller of the Currency has become satisfied of the default of the association under sections 5226 and 5227 to redeem any of its circulating notes, he may forthwith appoint a receiver, who, under his direction, shall take possession of the books, records and assets of the association, collect all debts, dues and claims belonging to it, "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United

States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings." It thus appears that in case of an involuntary liquidation under this section, the business of liquidation, as defined and required by the law, involved the appointment of the receiver, who should, in addition to the collection of the ordinary assets of the bank, also enforce against the stockholders their individual liability, so far as necessary to create a fund sufficient to pay all the debts of the association. It can hardly be supposed that the omission in the statute to provide an express and specific course of proceeding, by way of judicial remedy, in case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against either a deficiency of assets or the results of a fraudulent maladministration. Section 5151 imposes upon the shareholders of every National banking association an individual responsibility for all its contracts, debts and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders.

As all the shareholders are bound in that way to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity. Besides this, it must, we think, be admitted that a court of equity would be entitled, upon the general principles of its jurisdiction, to entertain a bill by one or more creditors whose suit would necessarily be for the benefit of all, against the association and its officers and managers, and all those participating in its voluntary liquidation, for the purpose of preventing and redressing any maladministration or fraud against creditors, contemplated or executed.. In the liquidation of such an association, those intrusted with its management occupy the relation of trustees, first for creditors; and the terms of that trust implied by law require them to reduce the assets of the association to money, or its equivalent, and to pay out those assets or their proceeds equally among creditors.

The omission in the original Banking Act of 1864 to provide

expressly similar remedies in case of voluntary liquidation to those specified in case of involuntary liquidation, was supplied by the act of June 30, 1876 (19 Stat. 63; Supplement to Revised Statutes, 216). The first section of that act provides for the appointment of a receiver by the Comptroller of the Currency, as provided in section 5234 of the Revised Statutes, whenever any National bank shall be dissolved and its charter forfeited, as prescribed in section 5239 of the Revised Statutes, or whenever any creditor shall have obtained a judgment against it which has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of its insolvency after due examination. This receiver, it is declared, shall proceed to close up such association and enforce the personal liability of the shareholders. Section 2 of the act of June 30, 1876, is as follows:

"That when any National banking association shall have gone into liquidation, under the provisions of section 5220 of said statutes, the individual liability of the shareholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditors' bill, brought by such creditor on behalf of himself, and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

This section was in force when the first-amended bill was filed in October, 1876. Whether we regard it as merely declaratory of the law as it stood under the original Banking Act, or as giving a new remedy which could not be resorted to before, we think it warranted the court below in permitting the complainant to file his first-amended bill.

In the case of involuntary liquidation under the supervision of the Comptroller of the Currency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, as far as may be necessary, to enforce the individual liability of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least, so closely connected with it as to constitute but one continuous transaction. When, in case of voluntary liquidation, the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems

to be no reason why the nature of the proceeding should be considered as changed. The intention of Congress evidently was to provide ample and effective remedies in all the specified cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of the stockholders. Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund, to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank. It was therefore proper to describe the bill to be filed by and on behalf of the creditors as in the nature of a creditors' bill, so as to enlarge the scope and purpose of a bill that might be more strictly limited as a creditors' bill merely.

We think therefore that if such a bill would have been objectionable without the statute, it is warranted by the statute. It is no objection that the original bill was filed prior to the passage of the act of June 30, 1876. The bill as amended, being authorized by the statute in force at the time the amendment was filed, would justify such a proceeding in a pending suit to which it was made germane by the statute itself, as well as an original bill then for the first time filed. Neither do we consider the objection valid that it does not purport to have been filed in pursuance of the act of June 30, 1876, and is not filed by the complainant on behalf of all the creditors. The scope and prayer of the bill under the operation of the statute, made it a bill for the benefit of the creditors, notwithstanding it erroneously claimed priority on behalf of the complainant individually. The only proper decree that could have been rendered upon it would have been for the equal distribution of the fruits of the litigation among all the creditors of the bank who in the mean time had come in and proved their claims. The final amendment, as we have already seen, only had the effect to make the bill conform to the course of the proceeding which had actually been had under it, and was

therefore purely formal. Its only effect was to make the bill profess to be what in law it was, and what in point of fact it had been considered to be.

Mr. Daniel (Ch. Pr. [4th ed.], chap. 5, § 1, p. 245) says: "The court will generally at the hearing allow a bill, which has been originally filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class." Our conclusion on this point is that the court below committed no error in permitting the amendments complained of to be made.

The assignment of error next to be considered arises upon the defense made on behalf of the defendants below, of the statute of limitations. The limitation relied upon is that prescribed by an act of Illinois, which provides that "actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Rev. Stat. Ill. (1881) 675.

It is not necessary to decide in this case whether the statute of Illinois relied upon is applicable, because, in the view which we have already taken of the nature of the amended bill filed in October, 1876, the statute, if applicable, ceased to run against the creditors of the bank entitled to the benefit of the decree, at that date. That amended bill is to be considered from the date of its filing as a bill on behalf of all the creditors of the bank who should come in under it and prove their claims. When any creditor appeared during the progress of the cause to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank. Any defense which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master or on the hearing to the court. The creditor, having established his claim, became entitled to the benefit of the proceeding as virtually a party complainant from the beginning, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's

right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing the bill. This being so, it is not disputed that in October, 1876, the bar of the statute had not taken effect, even on the supposition that the statute applied.

In the case of *In re General Rolling-stock Co., Joint-stock Discount Co.'s Claim*, L. R., 7 Ch. 646, MELLISH, L. J., stated that in a case where the assets of a debtor are to be divided among his creditors, whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the Court of Chancery in an administration suit, "the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the statute of limitations does not run against his claim; but as long as assets remain unadministered, he is at liberty to come in and prove his claim, not disturbing any former dividend."

Mr. Daniel (1 Ch. Pr., [4th ed.], chap. 15, part 2, p. 643) states that "a decree for the payment of debts under a creditors' bill for the administration of assets is also considered as a trust for the benefit of creditors, and will in like manner prevent the statute from barring the demand of any creditor coming in under the decree. The creditors' demand however must not have been barred at the time when the suit was instituted; for, if the creditors' demand would have been barred by the statute before the commencement of the suit the statute may be set up. It is to be remarked upon this point that it has been held that it was the decree only which created the trust, and that the mere circumstance of the bill having been filed, although it might have been pending six years, would not take the case out of the statute, but according to the later decisions, it seems that the filing of the bill will operate by itself to save the bar of the statute, though the plaintiff by delay in prosecuting the suit may disentitle himself to relief." He also says (chap. 29, ¶ 1, p. 1210): "It may be observed here that where a person, not a party to the suit, carries in a claim before the master under the decree, the party represent-

ing the estate out of which the claim is made has the right to the benefit of any defense which he could have made if a bill had been filed by the claimant in equity or an action had been brought at law to establish such claim. Therefore as we have seen an executor, may, in the master's office, set up the statute of limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the dedecree was pronounced."

The authorities abundantly sustain the proposition, also that a creditor who comes in under and takes the benefit of a decree is entitled to contest the validity of the claim of any other creditor, except that of the plaintiff whose claim is the foundation of the decree. 2 Dan. Ch. Pr. chap. 29, § 1, p. 1210, note 4, and cases cited.

In *Sterndale* v. *Hankinson*, 1 Sim. 393, decided in 1827, it was stated by Vice-Chancellor LEACH that "every creditor has to a certain extent an inchoate interest in a suit instituted by one on behalf of himself and the rest, and it would be attended with mischievous consequences to estates of deceased debtors if the courts were to lay down a rule by which every creditor would be obliged either to file his bill or bring his action." It is supposed by counsel for the appellants that the authority of this case is shaken by what was said by JESSEL, M. R., in his decision of *In re Greaves; Bray* v. *Tofield*, 18 Ch. Div. 551. It is true that in this case the master of the rolls said that creditors had better not rely upon that decision for the future; but he points out as the reason that at the time he was speaking (in 1881) bills in equity had been abolished in England, and that wherever it is an action to recover a debt upon a contract, the statute of James was binding upon the high court in every case in which it applies, and that it was no longer the practice, so far as personal estate was concerned, to bring an action by one creditor on behalf of others, because of a provision in the act of 1852, since the passing of which the practice had been abandoned of suing by one creditor on behalf of all, except in cases relating to real estate, as to which the section of the statute does not apply, unless it has been ordered to be sold or there is a trust or power of sale, and that therefore there were no longer any suits brought by any creditor, except

for the payment of his own debt. In the present case the suit, although in the nature of a creditors' bill, is not a bill merely for the administration of the assets of an insolvent corporation. The is no fund formerly belonging to the corporation in court for distribution. It is a suit for the enforcement of a personal liability of the defendant stockholders to pay the debts of the corporation, in which the creditors are the complainants. Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a co-complainant. It follows therefore that the statute sought to be applied in the present case ceased to run as against the complainants from the date when the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree. Whether or not the statute of limitations of Illinois would in any case operate to bar such a suit as the present, being a bill in equity in the Circuit Court of the United States, founded upon an obligation arising under an act of Congress, is a question which we are therefore not called upon to consider and decide.

Another assignment of error is peculiar to the appeal of the administrator *de bonis non* of William H. Adams, deceased. William H. Adams in his life-time was one of the defendants in the amended bill of 1876, and at the time of the suspension of the bank a stockholder to the extent of two hundred and forty shares. He died June 6, 1882, during the pendency of the suit, which stands revived as against his administrator *de bonis non*. The administrator contended that the personal liability of his intestate did not survive as against the administrator, and that therefore no decree could be rendered against him subjecting the estate of Adams in his hands for administration. The judicial decisions

more directly relied upon by the appellant in support of this contention are those of *Dane* v. *Dane Manuf'g Co.*, 14 Gray, 488; *Bacon* v. *Pomeroy*, 104 Mass. 577; *Ripley* v. *Sampson*, 10 Pick. 370; *Bangs* v. *Lincoln*, 10 Gray, 600; *Gray* v. *Coffin*, 9 Cush. 192. These cases however so far as they are in point, are based upon the particular language of the statutes of Massachusetts, materially differing from that contained in the National Banking Act. Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold therefore that the obligation of the stockholder survives as against his personal representatives. *Flash* v. *Conn*, 109 U. S. 371; *Hobart* v. *Johnson*, 19 Blatchf. 359; 8 Fed. Rep. 493. In Massachusetts it was held, in *Grew* v. *Breed*, 10 Metc. 569; 46 Am. Dec. 687, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity.

The next assignment of error to be considered arises upon the separate appeal of Charles Comstock, who is charged by the decree with an assessment upon one hundred and fifty shares of the capital stock of the bank standing in his name as owner at the time of its suspension. In his answer, which is under oath as called for, Comstock "admits that at the time of the said suspension he was the owner and holder of certain shares of capital stock thereof; that previous to ———, about in the year 1872, he was the owner of one hundred and fifty shares of said stock; that on or about the 8th day of February, 1873, this defendant sold, assigned and delivered fifty shares of the said stock to Ira Holmes, and on or about June, 1873, this defendant sold, assigned and delivered fifty other shares of said stock to Preston C. Maynard; that he endeavored repeatedly to have said

stock transferred on the books of the bank, but that said Maynard refused to allow said stock to be so transferred, although he had before promised to have the same transferred; that at the time of the said several sales of stock as aforesaid the said banking association was carrying on its regular business of banking, and was in fact solvent and fully able to pay its debts, and, as he is informed and believes, not indebted to any of the present creditors of said bank; that afterward, on or about the 23d day of September, 1873, this defendant sold, assigned and delivered to the said Ira Holmes his other fifty shares of stock in said bank with other property, receiving in payment therefor, and for the other property sold to said Holmes at the same time, certain promissory notes of one William Patrick, payable to the said Ira Holmes, and was secured with certain other notes by mortgage from said William Patrick to said Ira Holmes, which said notes and mortgage have proven to be of little value to the defendant, and in consequence of the incumbrances and taxes upon said property and the expense of foreclosing, and how much of the value of said notes and security should be attributable to the consideration of this sale of said stock, this defendant is unable to state; but he insists that at the time of said sale to said Holmes this defendant was informed and believed said bank was able to pay all its debts in full, and the consideration received by him was paid by said Holmes out of his individual property, and not from the assets or property of said bank."

The stock-books introduced on the part of the complainant show that fifty shares of this stock were transferred September 23, 1873, fifty more on September 24, 1873, and fifty more were canceled on the last date; and the testimony of Holmes is that, as to the last fifty shares, they must have been transferred at the same time. The transfers in each case were to Ira Holmes. It is found by the decree of July 23, 1883, that the bank became insolvent and suspended payment September 23, 1873, and went into voluntary liquidation on September 26, 1873. The resolutions of the shareholders of the bank instructing the directors to put the bank into voluntary liquidation, were passed at a meeting held on September 25, 1873. One of the resolutions is as follows: "That this bank, in its endeavors to continue business through the ex-

isting panic, has substantially exhausted its cash resources and is unable to continue cash payments, and that we regard it for the best interests of the stockholders and depositors alike that its affairs be placed in voluntary liquidation in accordance with the forty-second section of the National Currency Act in that behalf provided." The directors, at a meeting held on the same day, resolved to go into voluntary liquidation and close up the affairs of the bank in pursuance of this resolution. The notice to the public, addressed to the creditors of the bank, was issued and advertised the next day. As to the fifty shares of stock sold by Comstock to Holmes on September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of fifty shares in February, 1873, and of the other fifty shares in June, 1873, there is no reason to suppose were not made in entire good faith and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that Comstock continued to be upon the books of the bank the owner of these shares until September 23 and September 24, when they were respectively transferred.

By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. It follows therefore that Charles Comstock, in respect to the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability, as such stockholder, is the same as if he had that day sold and transferred the stock to Ira Holmes, but such a sale and transfer could only have been made that day by Comstock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank. It

would operate as a fraud on the creditors, an effect which the law will not permit. The case is not within the rule laid down in *Whitney* v. *Butler*, 118 U. S. 655; *ante* 177. Here there is no proof, as there was in that case, of the delivery of the certificates to the bank and a power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee. We are therefore constrained to hold that the decree below, in charging Comstock with liability as the owner of one hundred and fifty shares, was not erroneous.

The next assignment of error is based upon that part of the decree which directs payment of the claims reported by the master under the denomination of Class D, amounting in the aggregate to $185,119.34. They are designated by the master as claims "arising before the failure of the bank, upon which worthless collaterals were subsequently received." It is averred by the appellees that they are claims arising, for the most part, if not in all instances, upon indorsements and guaranties made in the name of the bank by Holmes, its president, after the suspension of the bank, and while it was in liquidation. It appears clearly from the evidence that, in many cases, parties having claims against the bank accepted from Holmes commercial paper held by the bank which it had received in the course of its business, and which constituted a part of its assets, running some of it several months and some of it several years, bearing interest, some at the rate of eight and some at the rate of ten per cent per annum, indorsed and guaranteed in the name of the bank by Holmes, as president. The books of the bank show that in these cases the paper so received was charged against the account of the party receiving it, thus closing the account as settled. In these cases, it is testified by Holmes that the creditors gave their checks to the bank for the amount standing to their credit. In some cases, the creditors or their agents testifying to the transactions, without contradicting Holmes in respect to what was in fact done, nevertheless state that the paper accepted by them was received, not in payment, but as security. It is obvious however that in most, if not all instances, the witnesses are referring to the security which they supposed they had received and were entitled to

rely upon, by means of the indorsement guaranty of the paper thus received, made by Holmes, as president, in the name of the bank. They certainly acted upon this belief, for in many instances they proceeded to obtain judgments against the bank, after the maturity and dishonor of the paper so received, upon these indorsements and guaranties, and in this proceeding proved their claims in that form by transcripts of such judgments. It is true that, in the final decree, the master was directed to correct his computation of interest so as to equalize the claims of the creditors by allowing interest at a uniform rate from the time of the suspension upon the amounts as they appeared to be due from the books of the bank; but all the claims in Class D, notwithstanding the settlements made, were included in the amounts found due and ordered to be paid. In this respect we are of the opinion that the decree is erroneous. Those creditors who made settlements after the bank was put into liquidation, and received from the president in that settlement paper of the bank, or as in some cases the individual notes of Holmes himself, indorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is, indeed, for all the contracts, debts and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation. After that there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders.

No such express authority appears in this case; and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation is that which results by impliction from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the bank and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may

be made in the bills receivable and other assets of the bank in specie, and the title to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose in the name of the bank; but such indorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the fact of liquidation, and is chargeable with knowledge of its consequences. He takes the assets received at his own peril. He is dealing with officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation looking to future payment, it must be from other parties. It is not within the power of the officers of the bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank, when it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word "liquidation." Mr. Justice STORY, said in *Fleckner* v. *Bank of U. S.*, 8 Wheat. 362: "Its ordinary sense, as given by lexicographers, is to clear away, to lessen debt, and, in common parlance, especially among merchants, to liquidate the balance is to pay it." In *White* v. *Knox*, 111 U. S. 787; *ante* 128, it was said: "The business of the bank must stop when insolvency is declared." In *National Bank* v. *Insurance Co.*, 104 U. S. 54; *ante* 20, the liquidation of such an association was said to be like that which follows the dissolution of a copartnership.

In this view, it is contended, on behalf of the creditors interested, that, as they relied upon the continuing liability of the bank and of its shareholders, by virtue of these indorsements and guaranties, if they are deprived of the benefit of the latter, the settlements themselves should be set aside, and they, the creditors, restored to the situation in which they were at the time of the suspension of the bank. But this is clearly inadmissible; such a restoration cannot in fact be made. The circumstances of

the situation have greatly changed by the lapse of time. The creditors who entered into these settlements have no ground of complaint against the bank, as a corporation, or as against its stockholders. They were not misled to their hurt by any fraudulent misrepresentations or concealments of any matters of fact. Whatever mistake was made was their own, and it was a mistake consisting merely in a misapprehension of their legal rights. They were bound to know, as well as Holmes, the limits of his authority, and ought to have acted on the presumption that he had no right to bind the bank or its shareholders *in futuro* by any new engagement. If they chose, in their eagerness to obtain a settlement in advance of other creditors equally entitled, to accept a part of the assets of the bank or the personal obligation of its president in settlement of their claims, they must abide by the election which was then made, and which cannot now be set aside. They made their settlements in view of their own estimate of the present advantage. They cannot now undo them to the disadvantage of other creditors, over whom they sought to obtain preferences, nor to the prejudice of the stockholders, who have a right to be exonerated from the payment of all contracts, debts and engagements of the bank contracted since the date of its suspension.

In respect to these claims in Class D, Ira D. Holmes, the president, testified as follows: "Q. In each case where you settled with the creditor of the bank, and turned him out bills receivable of the bank, how was that settlement — was it a payment, or what was the transaction? A. It was a full payment of the demand. He gave me his check on the bank for the amount, the same as if we were doing a regular business, and the parties should come in and buy so much bills receivable and give me a check on another bank. Q. Was there any case in which there was any other understanding than that he took these bills receivable in payment of his demand against the bank? A. Not any." On his cross examination he is asked: "Q. If the creditors agree to take paper in full payment, why would the bank guaranty it? A. I didn't say they agreed to take it in full; a great many people took the paper without guaranty, and others would not take it unless they had a guaranty; only when it got

down to the last settlement, and they would not take it unless the bank would guaranty it."

The force of this testimony is, we think, that the party accepted the paper, with or without the guaranty, in settlement of the claim as it stood on the books of the bank on the day of the suspension. Those who insisted upon the guaranty or indorsement by the bank undoubtedly relied upon it as an obligation which they might thereafter enforce; but their reliance was upon that contract, and not upon the original claim. It does not detract from the binding nature of the settlement that this guaranty was given and received and relied upon. The only mistake now asserted as a ground for going behind the settlement is that the guaranty or indorsement is not effective as an obligation of the bank for which the stockholders are individually responsible. But this is not a mistake as to what the parties intended to do. It is only a mistake as to the effect of what they did. As the bank was in liquidation, and the officers were not authorized to enter into new contracts, the presumption is, in every case where the creditor accepted paper in settlement of his claim, that it was received in payment and operated as a satisfaction. If there was any other agreement by which that paper was received merely as collateral to the original debt, and received as security, and not in payment, it must be affirmatively shown.

We have carefully examined all the evidence contained in the record in respect to each of the claims embraced in Class D of the master's report. We are not able to find as to any one claim that it is an exception from the general rule as to settlements established by the testimony of Holmes. In several instances, it is true that the witnesses with whom the settlements were made alleged that the notes with the indorsements or guaranties were not taken in payment and satisfaction, but as additional security for their claims; and that the transactions were made upon the faith that the remedy against the bank and against its stockholders was not thereby impaired. But it is quite evident, we think, that in each of these cases the reliance was not upon the liability arising upon the claim as it stood prior to the settlement, but upon the indorsement or guaranty of the bank, and the belief that the liability of the stockholders remained unaffected by the

transaction. The facts in each case are that the claim as it stood upon the books of the bank, was settled between the parties by the creditor accepting bills receivable out of the assets of the bank, or the individual note of its president indorsed or guaranteed in the name of the bank; supposing that, in the event of default in payment by the other parties to the paper, the obligation of the bank itself was preserved by the indorsement or guaranty, and that for that contract the stockholders continued to be liable. Upon this view of the facts, the stockholders are by law exonerated from the obligation to contribute to the payment of any claims of this class. All those enumerated in Class D in the master's report therefore should have been excluded from the benefits of the decree.

Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholders is for the contracts, debts and engagements of the bank, we see no reason to deny to the creditor, as against the shareholder, the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors; and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment.

The next question arises upon the objection of the appellants to the allowance made by the decree of twenty per cent of the amount of the debts of the bank due at the date of the suspension, in addition thereto, to cover the expenses of the receivership. This sum, we think, ought not to have been allowed. The ordinary costs of the cause are, of course, taxable against the defendants as in other cases; but we see no reason why the stockholders should be required to contribute, as a debt due from the bank or themselves, to a fund for the payment of the expenses of the receiver-

ship. The receiver in this case was appointed under the original bill, before any claim was set up on behalf of the complainant and the other creditors against the stockholders upon their individual liability. The purpose for which the receiver was appointed was to collect the proper assets of the bank, and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and the fund so realized may be and was properly charged with the expenses of its collection; but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case differs in this respect from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank. Everything to be done must be done by and through him, and in his name. He is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. The equivalent for them, in the case of creditors who, upon the voluntary liquidation of the bank, seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause. No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever cost and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.

It is also objected to the decree that it included, among the claims directed to be paid out of the assessment upon the share-

holders, an amount, alleged to be about $5,000, in behalf of persons assumed to be creditors, but who did not appear in the cause or before the master to file and prove their claims. This was erroneous. No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by Henry B. Mason, one of the attorneys of the receiver, that he had "made a personal investigation of all the claims against the Manufacturers' National Bank, and, from the evidence introduced in the cause, and from outside knowledge confirmatory thereof, states that the Manufacturers' National Bank of Chicago is justly indebted to the several persons mentioned in the schedule hereunto annexed, and made part of this affidavit, in the principal sums set opposite their several names, with interest thereon from March 12, 1875, at the rate of six per cent per annum in each case," etc. No one appeared as claimant, and no authority is shown to any one to act for him or in his own name. These claims should have been disallowed.

The decree of the Circuit Court is accordingly reversed, and the cause is remanded, with directions to proceed therein as justice and equity may require, in conformity with this opinion; and it is so ordered.

Mercantile Nat. Bank of New York v. Mayor, etc., of New York.*

(121 U. S. 138.)

Taxation — "moneyed capital" — trust companies — savings banks — municipal bonds — stocks of foreign corporations.

The New York act of July 1, 1882, § 312, declaring that the stockholders in banks organized under the authority of the State, or of the United States, shall be assessed for the value of their shares of stock, is not inconsistent with U. S. R. S., § 5219, forbidding the taxes assessed on the stockholders to be at a greater rate than those assessed on other moneyed capital in the hands of individual citizens of the State, although the assessment-rolls showed that the securities of life insurance companies, the stock of corpora-

* Affirming 28 Fed. Rep. 776.

tions incorporated under the laws of New York, the deposits of savings banks, the stock of trust companies, the stock of companies created outside of the State and owned in the State, virtually escaped taxation.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

F. W. Whitridge, *Chas. W. Wells* and *Willard Brown*, for appellant.

James C. Carter, for appellees.

MATTHEWS, J. The bill in this case was filed by the appellant, an association organized as a National bank, in the city of New York, the object and prayer of which were to restrain the collection of taxes assessed upon its stockholders in respect to their shares therein, on the ground that the taxes assessed and sought to be collected by the defendants were illegal and void, under section 5219 of the Revised Statutes of the United States, as being at a greater rate than those assessed under the laws of New York upon other moneyed capital in the hands of the individual citizens of that State. The assessment in question was made for the year 1885, by the proper officer, acting in pursuance of section 312 of an act of the Legislature of the State of New York passed July 1, 1882, entitled "An act to revise the statutes of this State relating to banks, banking and trust companies," which reads as follows:

"SEC. 312. The stockholders in every bank or banking association organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein. Said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or ward or not. But in the assessment of said shares, each stockholder shall be allowed all the deductions and exceptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is

invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. Nothing herein contained shall be held or construed to exempt the real estate of banks or banking associations from either State, county or municipal taxes, but the same shall be subject to State, county, municipal and other taxation to the same extent and rate, and in the same manner, according to its value, as other real estate is taxed. The local authorities charged by law with the assessment of the said shares shall, within ten days after they have completed such assessment, give written notice to each bank or banking association of such assessment of the shares of its respective shareholders, and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act."

The hearing in the Circuit Court was had upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed, by and between the parties to the above-entitled suit, that for the purpose of the trial of this cause, the facts hereinafter stated are true, and that the cause be submitted for trial and decree upon such statement alone, together with the pleadings:

"(1) That the complainant, on the second Monday of January, A. D. 1885, and for several months prior thereto, had a capital stock of the par value of $1,000,000, and a surplus fund of $200,000; that nearly the whole of said capital and surplus fund was, during that period, invested in bonds of the United States of the par value of $949,000, and of a market value and cost largely exceeding that sum; that its shares of stock were each of the par value of $100, and of the number of ten thousand, and were then held by one hundred and forty-two persons and corporations, fifty of whom, owning one thousand eight hundred and seventy-seven shares, were residents of States other than the State of New York, and the remainder residents of the State of New York.

"(2) That on the second Monday of January, 1885, the proper tax officer of the city of New York, acting under chapter 409 of the Laws of 1882 of the State of New York, did value and assess for taxation the shares of stock of said bank against the individual shareholders thereof, at the rate of $89 per share, after deducting the proportion of the assessed value of the real estate of said bank applicable to each share of stock as by law required, making the total gross valuation of said shares in the hands of the shareholders the sum of $890,000, from which sum the debts of sundry indebted stockholders, amounting to $89,128, were de-

ducted, as by law allowed, leaving the total valuation of said shares against said stockholders, upon which taxes were thereafter assessed, the sum of $800,872.

"(3) That on the second Monday of January, 1885, the aggregate actual value of the shares of stock of the incorporated moneyed and stock corporations incorporated by the laws of the State of New York, deriving an income or profit from their capital or otherwise (not including life insurance companies, trust companies, banks or banking associations, organized under the authority of this State or of the United States), amounted to the sum of $755,018,892; that Exhibit A, hereto appended and made a part of this agreement, contains a list of the corporations whose shares of capital stock are embraced in said sum of $755,018,892, and also shows the total par value of the shares of capital stock of each of said corporations.

"(4) That at the period aforesaid the aggregate actual value of the shares of stock of the life insurance companies incorporated under the laws of this State amounted to the sum of $3,540,000, and at the same period the aggregate value of the personal property of said companies, consisting of mortgages, loans with collateral security, State, county and municipal bonds, and railroad bonds and shares of stock of corporations (but not including the bonds of the United States, nor the shares of corporations created by the State of New York), amounted to $195,257,305 — all of which is shown in detail in the schedule hereunto annexed, marked 'Exhibit B.'

"(5) That at the said period the aggregate actual value of the shares of the capital stock of the trust companies existing in the State of New York, and organized under its laws, amounted to $32,018,900, as is shown in detail in the schedule hereunto annexed, marked 'Exhibit C,' of which sum the amount of $30,215,900 was of trust companies located in the city of New York.

"(6) That at the same period the aggregate actual value of the deposits due by the savings banks of this State to depositors was $437,107,501 (not including the surplus accumulated by the said corporations, amounting to $68,669,001).

"(7) That the aggregate actual value of the bonds and stocks

issued by the city of New York, subject to the provisions of chapter 552 of the Laws of 1880, at the said period, amounted to $13,467,000.

"(8) That the aggregate actual value at the same period of the shares of stock of corporations created by States other than the State of New York, owned by the citizens of the State of New York, amounted to at least the sum of $250,000,000.

"(9) The assessed valuation of all personal property, after making the deductions allowed by law, in the city of New York, (at the said period), as shown by the annual record of the assessed valuation of real and personal estate of the said city for the year 1885, was $202,673,806. This sum included the capital of corporations (after making deductions for investments thereof in real estate, shares of New York corporations, taxable upon their capital stock under the laws of this State, and non-taxable securities), as follows:

Insurance companies	$2, 146, 379
Trust companies	156, 506
Miscellaneous companies	29, 234, 409
Railroad companies	12, 339, 871
"It also included:	
Shares of National banks	45, 046, 074
Shares of State banks	15, 700, 220
"The sum so deducted for the value of the real estate belonging to said trust companies located in the city of New York did not exceed	2, 336, 572 31
The assessed value of the real estate in said city for said period is	1, 168, 443, 137
And in the said State, including the city of New York, is	2, 761, 973, 845
The latter sum including the sum of about	340, 000, 000

—Being the assessed value of the real estate located in said State belonging to corporations.

"The 'aggregate amount of the taxable personal estate' within the State of New York, exclusive of said city, after deducting debts due by the owners thereof for the year ending December

31, 1884, as assessed by the assessors and returned to the State Comptroller, is $151,632,369. This sum included the capital of corporations, after making the deductions for investments thereof in real estate, shares of New York corporations taxable upon their capital stock under the laws of this State, and non-taxable securities, of the amount of $34,466,612.

The aggregate capital stock, taken at par, of the National banks outside of the city of New York, but within the State of New York, on December 20, 1884, as shown by the report of the Comptroller of the Currency of the United States, was	$36, 804, 160
And that of State banks, outside of the said city, but within said State, as shown by the report of the Bank Superintendent of New York, is.....	8, 128, 000
Total (outside of New York city)	$44, 932, 160
The total par value of the shares of National banks in said State, including the city of New York, for the period aforesaid, is.....	83, 054, 160
And of the State banks.....	32, 815, 700

"(10) That it is the intention of the defendants, unless restrained by injunction, to collect the said tax levied by them against the shareholders of the said complainant upon said shares by the use of all needful legal process.

"(11) That any statutes of the United States, or of the State of New York, may be cited and relied upon before the said court as if herein fully set forth."

From a decree dismissing the bill the present appeal is prosecuted.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions: that the taxation shall not be at a greater rate than is assessed upon other

moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

In the present case no question is raised by the appellant as to the validity of section 312, chapter 409, of the Laws of New York of 1882, considered by itself, nor in reference to the rule of valuation or assessment which it prescribes. No exception is taken to the form of the assessment, nor is the case based in any degree upon the dereliction of the assessing officers in the discharge of their duties, there being no allegation and no proof that they have not performed their whole duty under the statutes of the State.

The proposition which the appellant seeks to establish is that the State of New York, in seeking to tax National bank shares, has not complied with the condition contained in section 5219 of the Revised Statutes, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, "in that it has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, while it has by its laws subjected National bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and State bank shares (having a like value of $22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank." This exemption, it is claimed, is of a "very material part relatively" of the whole, and renders the taxation of National bank shares void.

The exemptions thus referred to are classified as follows: (1) The shares of stock in the hands of individual shareholders of all incorporated "moneyed or stock corporations, deriving an income or profit from their capital or otherwise incorporated by the laws of New York, not including trust companies and life insurance companies, and State or National banks." The value of such shares, it is admitted, amounts to $755,018,892. (2) Trust companies and life insurance companies. The actual value of

the shares of stock in trust companies amounts to $32,018,900, and the actual value of the shares in life insurance companies amounts to $3,540,000, which life insurance companies, it is admitted, are the owners of personal property, consisting of mortgages, loans, stocks and bonds to the value of $195,257.305. (3) Savings banks, and the deposits therein. The deposits amount to $437,107,501, and an accumulated surplus to $68,669,001. (4) Certain municipal bonds issued by the city of New York, under an act passed in 1880, of the value of $13,467,000. (5) Shares of stocks in corporations created by States other than New York, in the hands of individual holders, residents of said State, amounting to $250,000,000.

It is argued by the appellant that these exemptions bring the case within the decision of *Boyer* v. *Boyer*, 113 U. S. 689; *ante* 151. In that case, referring to the legislation of Pennsylvania, it was said: "The burden of county taxation imposed by the latter act has at all events been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which, in its corporate capacity, is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for State purposes, when such corporations pay into the State treasury the required tax on such indebtedness."

This enumeration of exempted property, the amounts of which were stated in the bill and admitted by the demurrer, was held to include such a material portion relatively of the moneyed capital in the hands of individual citizens as to make the tax upon the shares of National banks an unfair discrimination against that class of property, but no attempt was made in the opinion of the court to define the meaning of the words "moneyed capital in the hands of individual citizens," as used in the statute, or to enumerate all the various kinds of property or investments that came within its description, or to show that shares of stock in the hands of stockholders of every institution, company or corporation of a State, having a capital employed for the purpose of

earning dividends or profits for its stockholders, were taxable as moneyed capital in the hands of individual citizens.

It is accordingly contended, on behalf of the appellees in the present case, (1) that the shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, including trust companies, life insurance companies and savings banks, are not moneyed capital in the hands of the individual citizen, within the meaning of the act of Congress; (2) that, if any of them are, then the corporations themselves are taxed under the laws of New York in such a manner, and to such an extent, that the shares of stock therein are in fact subject to a tax equal to that which is assessed upon shares of National banks; and (3) that, if there are any exceptions, they are immaterial in amount, and based upon considerations which exclude them from the operation of the rule of relative taxation intended by the act of Congress.

In view of the nature of the contention between the parties to this suit, and the extent and value of the interests involved, it becomes necessary to review with care the previous decisions of this court upon the same subject, and to endeavor to state with precision the rule of relative taxation prescribed to the States by Congress on shares of National banks.

The National Banking Act of 1864 (13 Stat. 112), in addition to the restrictions now imposed upon the State taxation of National bank shares, declared "that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." In the re-enactment of this statute, in 1868 (15 Stat. 34), this proviso was omitted. The case of *Van Allen* v. *Assessors*, 3 Wall. 573; 1 Nat. Bank Cas. 1, was decided under the act of 1864, as originally enacted. In that case the Taxing Law of New York, which was in question, was held to be invalid, because it levied no taxes upon shares in State banks at all, the tax being assessed upon the capital of the banks after deducting that portion which was invested in securities of the United States; and it was held that this tax on the capital was

not a tax on the shares of the stockholders equivalent to that on the shares in National banks. It was also decided in that case that it was competent for the States, under the permission of Congress, to tax the shares of National bank stock held by individuals, notwithstanding the capital of the bank was invested in bonds of the United States which were not subject to taxation.

It appears therefore as the result of the decision in that case, that a tax upon the capital of a State bank, levied upon the value thereof, after deducting such part as was invested in non-taxable government bonds, was less than an equivalent for a tax upon the shares of National banks from which no such deduction was permitted. Accordingly, in the case of *People* v. *Commissioners*, 4 Wall. 244; 1 Nat. Bank Cas. 9, the complaint was made on behalf of individual owners of National bank stock taxed in New York that no deduction was permitted to them from the value of their shares on account of the capital of the bank being invested in non-taxable government bonds, while such deduction was allowed in favor of insurance companies and individuals in the assessment for taxation of the value of their personal property; and it was contended therefore that the relators in that case were taxed upon their shares of National bank stock at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. In reference to this supposed inequality the court said: "The answer is that, upon a true construction of this clause of the act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens. This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened State or government, certain descriptions of property, and also certain institutions, such as churches, hospitals, academies, cemeteries and the

like, are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform." The court then proceeded to show that the exclusion, as the subject of taxation, of government securities held by individuals, from their moneyed capital, was by authority of the United States, and hence it would be a contradiction to infer that Congress meant to include the same government securities as a part of the moneyed capital which it required to be taxed by the States at a rate equal to that imposed by the latter upon the shares held by individuals of National bank stock.

The other objection taken to the validity of the tax complained of was that insurance companies, created under the laws of the State, were authorized to deduct from the amount of their capital and surplus profits, for purposes of taxation, such part as was invested in United States securities. In reference to this the court said: "The answer is that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but, even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them."

In *Lionberger* v. *Rouse*, 9 Wall. 468; 1 Nat. Bank Cas. 41, it was held that the proviso originally contained in the act of 1864, and omitted from the act of 1868, expressly referring to State banks, was limited to State banks of issue. The court said (p. 474): "There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of National bank circulation." Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands.

In the case of *Hepburn* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113, it was decided to be competent for the State to value, for taxation, shares of stock in a National bank at their actual value, even if in excess of their par value, provided thereby they

were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. It was a further question in that case whether the exemption from taxation by statute of "all mortgages, judgments, recognances and moneys owing upon articles of agreement for the sale of real estate" made the taxation of shares in National banks unequal and invalid. This was decided in the negative on the two grounds: (1) That the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and of the debts secured upon it; and (2) because it was partial only, not operating as a discrimination against investments in National bank shares. The court said: "It could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt."

The subject was further considered in the case of *Adams* v. *Nashville*, 95 U. S. 19; 1 Nat. Bank Cas. 148. One of the questions in that case had reference to an exemption from taxation by State authority of interest-paying bonds, issued by the municipal corporation of the city of Nashville, in the hands of individuals. It was held that the exemption did not invalidate the assessment upon the shares of National banks. The court said (p. 22): "The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in National banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six teacups and saucers, of the old statutes), the property of clergymen to some extent, school-houses, academies and libraries, are generally exempt from taxation. The discretionary power of the Legislatures of the States over all these subjects remains as it was before the act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

In *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57, it was held that the prohibition against the taxation of National

bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations, and that consequently where the State statute authorized individuals to deduct the amount of debts owing by them from the assessed value of their personal property and moneyed capital subject to taxation, the owners of shares of National banks were entitled to the same deduction. The cases of *Supervisors* v. *Stanley*, 105 U. S. 305; *ante* 33; *Hills* v. *Exchange Bank*. id. 319; *ante* 45; *Evansville Bank* v. *Britton*, id. 322; *ante* 48; and *Cummings* v. *National Bank*, 101 id. 153; 2 Nat. Bank Cas. 74, are applications of the same principle.

The rule of decision in *Van Allen* v. *Assessors*, 3 Wall. 573; 1 Nat. Bank. Cas. 1, is not inconsistent with that followed in *People* v. *Commissioners*, 4 Wall. 244; 1 Nat. Bank Cas. 9. In the former of these cases the comparison was between taxes levied upon the shares of National banks and taxes levied upon the capital of State banks. In the valuation of the capital of State banks for this taxation, non-taxable securities of the United States were necessarily excluded, while in the valuation of shares of National banks no deduction was permitted on account of the fact that the capital of the National banks was invested in whole or in part in government bonds. The effect of this was, of course, to discriminate to a very important extent in favor of investments in State banks, the shares in which *eo nomine* were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against National bank shares taxed without such deduction at a value necessarily and largely based on the value of the Government securities in which by law a large part of the capital of the bank was required to be invested. In the case of *People* v. *Commissioners* the comparison was not between the taxation of shareholders in National banks and of shareholders in State banking institutions, but between the taxation of National bank shares and that of personal property held by individuals and insurance companies, from the valuation of which the deduction was permitted of the amount of non-taxable government securities held by them respectively. The general ground of the de-

cision was that the exemption was not an unfriendly discrimination against investments in National banks in favor of other investments of a similar and competing character. It was held that the exemption, under State authority, of United States securities, which it was not lawful for the State to tax, could not be considered an unwarranted exemption in that case. It was also held that the language of the act of Congress which fixed the rate of taxation upon National bank shares, by reference to that imposed by the State "upon other moneyed capital in the hands of individual citizens," excluded from the comparison moneyed capital in the hands of corporations, unless the corporations were of that character, such as State banks were held to be in the case of *Van Allen* v. *Assessors;* that shares of stock in them fell within the description of "moneyed capital in the hands of individual citizens." In that way a distinction was established between shares of stock held in banking corporations and those held in insurance companies and other business, trading, manufacturing and miscellaneous corporations, whose business and operations were unlike those of banking institutions.

It follows, as a deduction from these decisions, that "moneyed capital in the hands of individual citizens" does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally, whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery under blank powers of attorney, and to be dealt in by sales at the stock exchange, or used as collaterals for loans, as though they were negotiable security for money. This quality, in a greater or less degree, pertains to all stocks in corporate bodies, the facility of their use in this way being in proportion to the estimated wealth and credit, present or prospective, of the corporation itself. Neither is the difference to be determined by the character of the investments in which, either by law or in fact, the bulk of the capital and the

accumulated surplus of the corporation is from time to time invested. It does not follow, because these are invested in such a way as properly to constitute moneyed capital, that the shares of stock in the corporations themselves must necessarily be within the same description. Such is the case of insurance companies, in respect to which it was held in *People* v. *Commissioners*, that shares of stock in them were not taxable as "moneyed capital in the hands of individual citizens," and that the language of the act of Congress does not include moneyed capital in the hands of corporations. The true test of the distinction therefore can only be found in the nature of the business in which the corporation is engaged.

The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of National banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent however with these National uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under State laws, either by corporations or private persons, and capital in the

form of money might be invested and employed by individual citizens in many single and separate operations, forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in National banks, would diminish their value as an investment, and drive the capital so invested from this employment, if at the same time similar investments and similar employments, under the authority of State laws, were exempt from an equal burden. The main purpose therefore of Congress, in fixing limits to State taxation on investments in the shares of National banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy.

Applying this rule of construction, we are led, in the first place, to consider the meaning of the words "other moneyed capital," as used in the statute. Of course it includes shares in National banks; the use of the word "other" requires that. If bank shares were not moneyed capital, the word "other" in this connection would be without significance. But "moneyed capital" does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation; but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

So far as the policy of the government in reference to National banks is concerned, it is indifferent how the States may choose to

tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of National banks. There is no reason therefore to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and National, and municipal and other corporations. These are the operations in which the capital invested in National banks is employed, and it is the nature of that employment which constitutes it, in the eye of this statute, "moneyed capital." Corporations and individuals carrying on these operations do come into competition with the business of National banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration. They do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

The terms of the act of Congress therefore include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money,

where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are, from time to time, according to the rules of the business, reduced again to money, and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank* v. *Britton*, 105 U. S. 322; *ante* 48: "The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations, are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way."

This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy. From this view, it follows that the mode of taxation adopted by the State of New York in reference to its corporations, excluding for the present trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of National banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

This is the conclusion reached on similar grounds by the Court of Appeals of New York. In the case of *McMahon* v. *Palmer*, 102 N. Y. 176; 55 Am. Rep. 796; *post* , that court said: "Our system of laws, with reference to the taxation of incor-

porated companies and capital invested therein, has been carefully framed with a view of reaching all taxable property, and subjecting it to equality of burden, so far as that object is attainable in a matter so complex. In view of the wide variation in the employable value of such investments, and the frequent mutations in their conditions, it is by no means certain that this object has not been attained with reasonable accuracy. It is quite clear, from even this cursory review of the statutes, that if any discrimination is made by our laws in taxing capital invested, it is not to the prejudice of that employed in banking corporations. Even if this were not the result of the statute, we are of opinion that investments in the shares of companies named, do not come within the meaning of that clause in the Federal statutes referring to other moneyed capital in the hands of individuals. That phrase as generally employed, distinguishes such capital from other personal property and investments in the various manufacturing and industrial enterprises. And this is the sense in which it is used in our tax laws, as appears by reference to the statutes."

The cases of trust companies and savings banks require separate consideration. Section 312 of chapter 409 of the act of 1882 is a re-enactment of section 3 of chapter 596 of the Laws of 1880, except that in the latter, trust companies were included with banks and banking institutions, so as to subject the stockholders therein to the same rule of assessment and taxation on the value of their shares of stock. The present statute omits them from the corresponding section. The consequence is that trust companies are taxable, as other corporations, under the act of 1857, for local purposes, upon the actual value of their capital stock. By chapter 361 of the Laws of 1881, as amended, they are subjected to a franchise tax, in the nature of an income tax, payable to the State for State purposes. It is argued from this legislation, in reference to the taxation of trust companies, that it discloses an evident intent to discriminate in favor of the latter, as between them and banks, including National banks; and it is argued that considering the nature of the business in which trust companies are engaged, it is a material and unfriendly discrimination in favor of State institutions engaged to some extent in a competing

business with that of National banks. Trust companies however in New York, according to the powers conferred upon them by their charters, and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust, and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation, or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts; to act as agent for corporations in reference to issuing, registering and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that State.

It is evident from this enumeration of powers, that trust companies are not banks, in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce. They receive money on deposit, it is true, and invest it in loans, and so deal therefore in money and securities for money, in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the act of Congress. But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in National banks.

It appears from the tax laws of New York applicable to the subject, as judicially construed by the Court of Appeals of that State, that the capital stock of such a corporation is to be assessed at its actual value. The actual value of the whole capital stock is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole

number of shares. *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449; *People* v. *Commissioners of Taxes*, 95 id. 554. From this are to be deducted, of course, the real estate of the corporation otherwise taxed, and the value of such part of the capital stock as is invested in non-taxable property, such as securities of the United States. In addition to this, the corporation, as already stated, pays to the State, as a State tax, a tax upon its franchise based upon its income; the tax upon the capital being for local purposes.

It is evident we think that taxation in this mode is at least equal to that upon the shares of individual stockholders; for if the same property was held for the same uses, and taxed by the same rule in the hands of individuals as moneyed capital, it would be subject to precisely the same deductions; in addition to which the individual would be entitled to make a further deduction of any debts he might owe. Upon these grounds therefore we are of opinion that this mode of taxing trust companies does not create the inequality which the appellant alleges. In the case of savings banks we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (§ 4, chap. 456, Laws 1857) is as follows:

"Deposits in any banks for savings, which are due to the depositors, * * * shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State."

According to the stipulation in this case, the deposits in such banks amount to $437,107,501, with an accumulated surplus of $68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals, within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that if they are exempted from taxation, shares of stock in National banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with National banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote

their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen that by previous decisions of this court, it has been declared that "it could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt" (*Hepburn* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113); and that "the act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in National banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so." *Adams* v. *Nashville*, 95 U. S. 19; 1 Nat. Bank Cas. 148. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investment in National bank shares. However large therefore may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in National banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.

It is further objected on similar grounds, to the validity of the assessment complained of in this case, that municipal bonds of the city of New York, to the amount of $13,467,000, are also exempted from taxation. The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation — not large enough we think to make a material difference in the rate assessed upon National bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues

them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but, as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of National bank shares.

The same considerations apply to what is called an exemption from taxation of shares of stock of corporations created by other States and owned by citizens of New York, which it is agreed amount to at least the sum of $250,000,000. It is not pretended however that this exemption is based upon the mere will of the Legislature of the State. The courts of New York hold that they are not the proper subjects of taxation in the State of New York because they have no *situs* within its territory for that purpose. *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224; *People* v. *Commissioners of Taxes*, 4 Hun, 595. The objection would be equally good if made to the non-taxation of real estate owned by citizens of New York, but not within its limits. Clearly, the property to be taxed under the rule prescribed for the taxation of National bank shares must be property which, according to the law of the State, is the subject of taxation within its jurisdiction.

Upon these grounds, substantially the same as those on which the circuit judge proceeded (28 Fed. Rep. 776), we are of opinion that the appellant is not entitled to the relief prayed for. The decree of the Circuit Court is therefore affirmed.

BLATCHFORD, J., took no part in the decision of this case.

NATIONAL NEWARK BANKING CO. v. MAYOR, ETC., OF CITY OF NEWARK.

(121 U. S. 163.)

Taxation — "other moneyed capital."

The New Jersey act of April 11, 1866, section 15, exempts from taxation thereunder corporations which, by virtue of any contract in their charters, or other contracts with this State, are expressly exempted from taxation, except mutual life insurance companies specially taxed, and deposits in savings banks. *Held*, that the assessments of the National banks were not invalid by reason thereof.

APPEAL from the Circuit Court of the United States for the District of New Jersey

C. W. Wells and *John W. Taylor*, for appellant.

Joseph Coult and *John R. Emery*, for appellees.

MATTHEWS, J. This is a bill in equity filed by the appellant, a National bank organized under the act of Congress, doing business in the city of Newark, New Jersey, the object and prayer of which are to enjoin the collection of taxes assessed upon the individual shareholders therein, on the ground that according to the laws of New Jersey, under which the assessment has been made, the rate of taxation is greater than that assessed upon the moneyed capital in the hands of the individual citizens of the State. This alleged inequality, it is contended, results from certain exemptions authorized by the laws of New Jersey, whereby a material portion of the moneyed capital in the hands of individuals is freed from taxation. According to the allegations of the bill, these exemptions consist (1) of the shares of capital stock held by individuals in all private corporations of the State "except banking institutions, and except those which, by virtue of any contract in their charters, or other contracts with this State, are expressly exempted from taxation, and except mutual life insurance companies specially taxed," which exemptions, it is charged, amount to the sum of $301,485,000; and (2) of the deposits in savings banks, amounting to the sum of $24,017,916.99.

The fifteenth section of the act of April 11, 1866, establishing these exemptions, is as follows (Revision 1877, p. 1156): "That all private corporations of this State, except banking institutions, and except those which by virtue of any contract in their charters, or other contracts with this State, are expressly exempted from taxation, and except mutual life insurance companies specially taxed, shall be, and are hereby required to be, respectively assessed and taxed at the full amount of their capital stock paid in and accumulated surplus; but any real estate which such corporations may lawfully own in any other State than this State, shall not be liable to be estimated in such accumulated surplus, and the persons holding the capital stock of such corporations

shall not be assessed therefor; and such corporations as have no capital stock other than those above excepted shall be assessed for the full amount of their property and valuable assets, without any deductions for debts and liabilities; but depositors in savings banks, taxed by virtue of this section, shall be exempted from taxation on their personal estate to the amount of their deposits; provided, that premium notes held by life insurance companies shall in no case be considered as future premiums, but shall be included in the valuable assets of said company."

Under the statutory provision for the taxation of bank shares in New Jersey, the stock of every bank, National as well as State, is assessed for taxation in the place where the bank is located to all non-resident stockholders thereof, the taxes assessed on which are payable by the bank itself for their account; resident stockholders being taxed on their shares in the townships or wards in which they respectively reside. The rate of taxation is the same as that upon other personal property held by individuals, and is subject to deduction on account of debts due by the owner.

It is not claimed that the assessments complained of in this case are unequal or illegal, unless made so by the exemptions authorized by the fifteenth section of the act of April 11, 1866. There is no material difference between the legislation of New Jersey on this subject and that of New York, as considered in the case of *Mercantile Nat. Bank of New York* v. *Mayor, etc., of New York*, 121 U. S. 138; *ante* —. This case is therefore necessarily governed by the decision in that.

The decree of the Circuit Court is accordingly affirmed.

BLATCHFORD, J., took no part in the decision of this case.

STANLEY v. BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

(121 U. S. 535.)

Taxation — stock — uniformity — valuation — rule of assessors — excessive assessments — relief — writ of error — finding of fact.

Laws of New York, April 23, 1866, chap. 761, providing for the taxation of shares of stock in National banks, is in conflict with the act of Congress (R. S., § 5219) prohibiting such taxation at a greater rate than is imposed by the State upon other moneyed capital in the hands of individual citizens of such State, in so far as it does not permit a stockholder of a National bank to deduct the amount of his just debts from the assessed value of his stock; but such assessment is not therefore invalid unless the stockholder has shown the assessors what his just debts are, and has taken the requisite steps to have his assessment made out in accordance therewith.

The rule adopted by the board of assessors of the city of Albany, to assess all shares of stock in State and National banks in the city of Albany at par, without regard to their actual or market values, but making the requisite reduction for real estate owned by the banks, is not in conflict with the National Bank Act.

Excessive assessments should be corrected by the statutory course or by injunction.

Where a case is tried by the Circuit Court of the United States without a jury, the findings of the court upon questions of fact are not reviewable in the Supreme Court on a writ of error.

IN error to the Circuit Court of the United States for the Northern District of New York.

Matthew Hale, for plaintiff in error.

S. W. Rosendale and *W. H. Peckham*, for defendant in error.

FIELD, J. The act of Congress, in providing for taxation of the shares of National banks, by authority of the State in which such institutions are situated, imposes two restrictions upon the exercise of the power; namely, that the taxation shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National bank owned by non-residents of the State shall be taxed in the city or town where it is located. R. S., § 5219.

In *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57, this court held, with reference to taxation thus authorized, that the prohibition against discrimination has reference to the entire process of assessment, and includes the valuation of the shares, as well as the rate of percentage charged, and therefore that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital in the hands of individuals, was in conflict with the prohibition, although no greater percentage was levied on such valuation. If this were not so, a rule of appraisement, applied to shares of National banks, different from one applied to other moneyed capital, might lead to such varied valuations as to materially affect the amount of taxes levied, although the same percentage should be charged on the valuations. There must be a uniform rule of appraisement of value, and the same percentage charged on the values determined, to meet the requirements of the statute.

This action is founded upon alleged disregard of this requirement by the assessing officers of the county of Albany, New York. The plaintiff, Edward N. Stanley, is a citizen of Illinois; and claiming to be assignee of certain shareholders of the National Albany Exchange Bank, located at Albany, in New York, sues to recover the amount of certain taxes alleged to have been illegally collected from them upon their shares in that bank during the years from 1874 to 1879, both inclusive, and paid into the treasury of the county of Albany. The original complaint contained several counts, all of which, except the fourth, were substantially the same, except as to the names of the stockholders and the amounts assessed and collected. They alleged the assessment by the board of assessors of the city of Albany of the shares held by the assignors of the plaintiff, acting under color of an act of the Legislature of New York, passed April 23, 1866, being chapter 761 of the laws of that year, at $100 a share, being the par value thereof, after deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of the banking institution to the whole amount of its capital stock, and the collection of the amount levied, and its payment into the treasury of the county of Albany. They also alleged

upon information and belief, that chapter 761 of the Laws of 1866 was in conflict with the laws of the United States, and especially with the provisions that taxation by State authority of shares of stock in banking associations shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, for the reason, among others, that the said act of New York did not permit debts of the owners of the bank stock to be deducted from the value thereof in its assessment, although such deduction of the debts of the owner was at the time, and is still permitted and required by the laws of New York to be made from the value of every other kind of personal property, and moneyed capital other than bank stock, in assessing the same for the purpose of taxation.

They also alleged, upon information and belief, that the assessment of the shares of stock of the said banking association by the board of assessors was at a greater rate than their assessment upon shares of stock of bank organized under the laws of New York, and located in the same ward of the city, and was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. For these reasons the plaintiff alleged that the assessment of the shares of stock, and the levy of the tax thereunder, were illegal and void, and that the money received therefor was wrongfully collected and paid into the county treasury, and belonged of right to the shareholders, and not to the county.

The fourth count differed from the others in averring that the assignor of the plaintiff named in this count, Chauncey P. Williams, had presented to the board of assessors an affidavit stating that the value of his personal estate, including his bank stock, after deducting his just debts and property invested in the stock of corporations or associations liable to be taxed therefor, and his investments in the obligations of the United States, did not exceed $1, and requested the board of assessors to reduce his assessment to that amount, but that the board had refused to make such reduction; and that thereupon said Williams applied to the Supreme Court of the State for a writ of *mandamus* to compel the assessors to make the reduction; that the Supreme Court denied the application on the ground that the act of the Legislature

did not permit such reduction, but required the assessment of the bank stock at its full value; that the Court of Appeals of the State, on appeal, affirmed the decision and judgment of the Supreme Court; that the Supreme Court of the United States reversed the judgment of the Court of Appeals, and held that the statute, chapter 761 of the Laws of the State, of 1866, in that it did not permit a reduction for indebtedness from the assessment of bank stock, which by the laws of the State was required to be made from the assessment of every other kind of personal estate and moneyed capital, was in conflict with the laws of the United States.

The answer of the defendant consisted in a specific denial of the several allegations of the complaint, with an averment that the assessments were duly and regularly made by a board of assessors having jurisdiction of the matter. In a supplementary answer, the defendant also set up that the assignment of the amounts in suit to the plaintiff was improperly and collusively made for the purpose of giving the court jurisdiction.

The action was twice tried; at both times by the court without the intervention of a jury, by consent of parties. On the first trial, which took place in October, 1880, the plaintiff recovered the whole amount upon the first ground stated — that the act of New York, chapter 761 of the Laws of 1866, was in conflict with the act of Congress, in not permitting in the assessment of the value of the stock of the bank a reduction for the debts of the holder. The second ground of objection to the validity of the assessment — that it was at a greater rate than was assessed on other moneyed capital in the hands of individual citizens — was not considered. The case was then brought to this court for review. After full consideration, we held substantially this: that the statute of New York was in conflict with the act of Congress, so far as it did not permit a stockholder of a National bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the State the owner of all other personal taxable property was allowed to deduct such debts from its value; but that neither the statute nor the assessment under it was for that reason void. If the stockholder had no debts to deduct, the mode of assessment adopted was not invalid as to him; he could not complain

of it, nor recover the taxes paid pursuant to it. If he had debts, the assessment without a deduction for them in the estimate of the taxable value of the stock was only voidable. The assessing officers, in making the assessment, were acting within their authority until duly notified of the debts which were to be deducted. In such case therefore the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by law to obtain a correction of the over-assessment. We therefore decided that for the taxes collected upon the assessment alleged in the fourth count the plaintiff was entitled to judgment; this court having held, in *People* v. *Weaver*, that assessment invalid, for the reason that the assessors had not allowed any deduction for the debts of the stockholder; but that for the taxes collected upon the assessments alleged in the other counts no recovery could be had; the stockholders there mentioned not having produced any evidence that they had presented to the assessors an affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to the assessment of bank shares which was applied to the assessment of other personal property, or any evidence that they owed any thing whatever to be deducted, or that they had taken any steps under the laws of New York to correct the over-assessment complained of. The judgment of the Circuit Court was accordingly reversed, and judgment ordered for the plaintiff upon the fourth count, and for the defendants on the other counts. *Supervisors* v. *Stanley*, 105 U. S. 305, 316; *ante* 33.

Subsequently, upon the attention of the court being called to the fact that there was evidence in the case upon the allegation that the assessment of the shares of stock in the National Banking Association was at a greater rate than was assessed upon shares of stock in banks organized under the laws of New York, and located in the same city, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State, upon which the court below did not pass, the judgment was so far modified as to permit that court, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleadings to present it properly.

When the case was remanded, on application to the Circuit Court, all the counts except the fourth were amended. The substance of the amendments consisted in allegations that the assessors, by a rule prescribed by themselves, assessed the shares of the National Albany Exchange Bank at such greater rate; that the rule adopted was to assess all shares of stock in State and National banks in the city of Albany at par, without regard to their actual or market value, making the requisite deduction for real estate owned by the banks; that this rule necessarily resulted in imposing upon the shares of the National Albany Exchange Bank a greater rate of taxation than was assessed upon other moneyed capital generally; that there were in the Sixth ward of the city, at the time of the assessments, several banks, State and National; and that the actual value of the stock of the banks varied — that of the shares of stock in the National Albany Exchange Bank being considerably less than that of the stock of most of the other banks in the city.

Several of the counts were afterward abandoned, those remaining applying only to the taxes of the years 1873, 1874 and 1875. The case came on for a second trial in March, 1883, and, after hearing the proofs, the court filed its findings of fact on the issues presented by the pleadings, and gave judgment for the plaintiff on the fourth count, and for the defendants on the other counts. To review this judgment the case is brought to this court on a writ of error.

Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is "that the plaintiff has failed to establish the allegations in said complaint, that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this State." And the first assignment of error is that

the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which is nothing more than that the court below found against the evidence — a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act March 3, 1865 (13 Stat., chap. 86, § 4; R. S., § 700).

The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was not in giving sufficient weight to the evidence offered — a matter determinable only in the court below.

To recover in this case, the plaintiff was required to prove, under the decision when the case was first here, that "the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the National banks higher, in proportion to their actual value, than other moneyed capital generally." The court below specially found the negative of this; that the assessors did not, at any of the times in question, habitually or intentionally, or by any rule prescribed by themselves, or by any one whom they were bound to obey, thus assess the shares of National banks. The counsel for the plaintiff insists however, notwithstanding this finding, that the inference of such habitual assessment at a higher rate follows from the findings that within the city of Albany there were nine banks, and that the actual value of the shares in all of them except one exceeded their par value, varying in that respect from ten to seventy per cent, premium, and yet the value of all was assessed at par. The actual value of shares of the National Albany Exchange Bank was thirty-five per cent above par, and the actual value of the shares of some of the other banks was above and some below that figure. The court found that the method pursued by the assessors was generally satisfactory to the owners of National bank stock in the city of Albany, with the

exception of a few stockholders in the National Albany Exchange Bank, and that such method was pursued by the assessors with no purpose or intention of unduly assessing shares of National banks, but simply because it was thought by them to be the most satisfactory one to the owners of such property, and the best in itself. A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value; any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, National and State, comes as near as practicable, considering the nature of the property to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing. In *Mercantile Nat. Bank of New York* v. *City of New York*, recently decided, this court said: "The main purpose of Congress in fixing limits to State taxation on investments in the shares of National banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring individuals or institutions carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy." *Ante*

The method pursued could in no respect be considered as adopted in hostility to the National banks. It must sometimes place the estimated value of their shares below their real value; but such a result is not one of which the holders of National bank shares can complain. It must sometimes lead also to over-valuation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Over-valuation of property is not a ground of action at

law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Supervisors*, 45 N. Y. 676–687; *National Bank of Chemung* v. *Elmira*, 53 id. 49–52; *Bruecher* v. *Village of Port Chester*, 101 id. 240–244; *Lincoln* v. *Worcester*, 8 Cush. 55–63; *Hicks* v. *Westport*, 130 Mass. 478; *Balfour* v. *City of Portland*, 28 Fed. Rep. 738.

In nearly all the States, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them — of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some States is complied with when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property, upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected

on an erroneous judgment of a court of competent jurisdiction before it is reversed.

When the over-valuation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings* v. *National Bank*, 101 U. S. 153; 2 Nat. Bank Cas. 74. In that case it appeared that the officers of Lucas county, Ohio, charged with the valuation of property for the purposes of taxation, adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The State Board of Equalization of bank shares increased the valuation of them to their full value. Upon a bill brought by the Merchants' National Bank of Toledo against the treasurer of the county in which the bank was established, to enjoin him from collecting taxes assessed on the shares of the stockholders, payment of which was demanded of the bank under the law, it was held that the rule or principle of unequal valuation of the different classes of property for taxation adopted by the board of assessment was in conflict with the Constitution of Ohio, which declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all the real and personal property according to its true value in money," and worked manifest injustice to the owners of shares in National banks; and that the bank was therefore entitled to the injunction against the collection of the illegal excess, upon payment of the amount of the tax which was equal to that assessed on other property. That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the Constitution of the State, but the same principle must apply when their action in assessing the shares of National banks is in disregard of the act of Congress. The plaintiff below did not think proper to resort to this method of obtaining relief, which would have given him all he was en-

titled to, if in fact his shares were assessed at a greater rate than was assessed on other moneyed capital, because of their illegal over-valuation.

It only remains to notice the exceptions taken to the exclusion of the testimony offered, that the law of New York required an oath or certificate to be annexed to the assessment-roll substantially different from the oath actually annexed, and the claim that the plaintiff has a right to recover the taxes assessed in 1873 and collected in 1874. The exclusion of the testimony as to the alleged defect in the assessment-roll was correct, under the stipulation of the parties that the plaintiff would not claim a right to prove any failure of the assessors to take the proper oath. A defect in the form of the oath annexed, if there be one, could have no bearing upon the question at issue. The claim for the taxes assessed in 1873 is open to similar objections to those presented against the claim for the taxes of the other years. If the assignors of the plaintiff had any just grounds of complaint to the assessment as excessive, they should have pursued the course provided by statute for its correction, or resorted to equity to enjoin the collection of the illegal excess, upon payment or tender of the amount due upon what they conceded to be a just valuation.

It follows that the judgment of the court below must be affirmed; and it is so ordered.

Judgment affirmed.

WILLIAMS v. BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.*

(122 U. S. 154.)

Taxation — discrimination — bank stock — constitutional law — remedial statute.

A county assessor assessed the stock of all the banks in the county, both State and National, at the par value. The actual value of the shares of the National Albany Exchange Bank was from twenty-five to thirty per cent above par. The actual value of the shares of all the banks in the county, with one exception, was above par from ten to over one hundred per cent. In a

*Affirming 21 Fed. Rep. 99.

suit by a shareholder of said National bank, to recover the amount paid upon his stock on the ground of discrimination, *held*, that the discrimination not being designed by the assessor, the assessment was valid.

Where the assessors are required by statute to complete the assessment-roll by a certain date, and to make oath to it in a prescribed form, and these requirements are necessary to enable notices to be published specifying a time when they would meet to review the assessments on the application of any person aggrieved, the non-completion of the assessment-roll by the specified date, and departure from the prescribed form of oath, may be cured by remedial statute subsequently enacted, providing the right of the tax payers aggrieved by the assessment to have their objections passed upon is saved.

IN error to the Circuit Court of the United States for the Northern District of New York.

Matthew Hale, for plaintiff in error.

S. W. Rosendale and *W. H. Peckham*, for defendant in error.

FIELD, J. This is an action to recover the amount of certain taxes alleged to have been illegally collected from the plaintiff and others on sundry shares of stock held by them in the National Albany Exchange Bank, in the city of Albany, New York, and paid into the treasury of the county. The stockholders other than the plaintiff assigned to him their respective claims before its commencement. Their demands were originally embraced in an action brought by one Edward N. Stanley against the board of supervisors, he being at the time assignee of their claims. In that action, judgment was recovered by him. The case being brought to this court, the judgment was reversed, and the cause remanded, with leave to the court below, in its discretion, to hear evidence upon the point whether the shares were habitually and intentionally assessed higher, in proportion to their actual value, than other moneyed capital generally, and, if necessary, to allow an amendment of the pleadings that the point might be properly presented. *Supervisors* v. *Stanley*, 105 U. S. 305; *ante* 33. When the case was remanded, on application to the court below, all the counts of the complaint, except the fourth, were amended. Subsequently however Stanley discontinued the action as to the claim

for the taxes assessed and collected for the years 1876, 1877 and 1878. The plaintiff then took an assignment of the claim for those taxes from Stanley, and commenced the present action. He contends that the assessment for those years upon the shares of the stock of the bank was illegal, on these grounds: (1) Because it was not made within the period required by law, which was before the 1st of September of each year, but after that date; (2) because it was not accompanied by the oath of the assessors that it had been made at the full and true value of the shares, subject only to certain specified deductions allowed by law; (3) because it was higher in proportion to the actual value of the shares than the assessment of other moneyed capital in the hands of individual citizens of the State was to its actual value. The defendant answered these grounds by a general denial, and by setting up an act of the Legislature of New York, passed April 30, 1883, legalizing and confirming the assessment.

The issues were tried by the court, without the intervention of a jury, by consent of parties. The court found the facts as admitted by the pleadings and by stipulation of the parties, from which it appeared, among other things, that no entry of an assessment of the shares of the stockholders of the bank was made upon the assessment-roll of 1876, 1877 and 1878, until after the 1st day of September of those years, and after the time provided by law for revising and correcting the assessment; that the oath of the assessors, annexed to the assessment of each year, was defective in its averment respecting the estimated value of the real estate assessed, but was correct in its averment of the estimated value of the personal property; that there were several banks, State and National, located in the city of Albany, and that the actual value of their shares during those years, with one exception, was above par, varying in that respect from ten to over one hundred per cent, and yet the value of all of them was assessed at par, and the actual value of shares in the National Albany Exchange Bank was from twenty-five to thirty per cent above par; that the assessment of the shares of some of the other banks was higher and of some of them lower than this figure; and that the assessment at par was not made by the assessors with the intent of discriminating against the holders of National bank shares, or

in favor of the holders of State bank shares, or other moneyed capital. As a conclusion of law, the court found that the assessments were illegal because not made in conformity with the laws of the State, but that they were legalized and confirmed by the act of its Legislature of April 30, 1883, and that they were not in violation of any law of the United States. 22 Blatchf. 302; 21 Fed. Rep. 90. Judgment was accordingly rendered for the defendant, and the plaintiff has brought the case here for review.

It may be conceded that the assessment of the shares of the National Albany Exchange Bank was in some instances higher, in proportion to their actual value, than the assessment of some other moneyed capital in the hands of individual citizens was to its actual value; but, as seen from the findings, such discrimination was not designed by the assessors. It is so stipulated by the parties. Whatever discrimination, in such instances, may have existed, arose from the difficulty of devising any other mode than the one adopted, which would work out greater equality and uniformity in the valuation of different kinds of moneyed capital. There was no proof as to the assessment of any moneyed capital, except shares of other banks, State or National. The value of shares in some of these banks was higher, in some lower, than that of the shares of the National Albany Exchange Bank. The method adopted of assessing all shares at par was generally satisfactory to the owners of the National bank stock in the city of Albany, with the exception of a few stockholders in the National Albany Exchange Bank. Considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, State and National, came, as we said in the recent case of *Stanley* v. *Board of Supervisors of Albany Co.*, *ante* 268, as nearly as practicable to securing between them equality and uniformity of taxation. All the banks, State and National, being thus placed, as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to under-valuation of the shares of National banks, the holders could not complain. If it sometimes led to over-valuation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as asserted, this course was

not, in the years mentioned, available to the plaintiff and the stockholders, whose interests were assigned to him, because their names were not placed on the assessment-roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. We have considered this subject so fully in the recent case of Stanley against these same defendants, to which we refer, that it is unnecessary to pursue it further.

The irregularities in the assessment for the years 1876, 1877 and 1878, in that no entry of any assessment of the shares of the plaintiff, and of the stockholders whose claims were assigned to him, was made, on the assessment-roll of those years, until after the 1st of September, and after the time for revising and correcting the assesement had passed, and in the defect of the oath annexed, in its averment as to the estimate of the value of real estate, were, in our judgment, cured by the Validating Act of April 30, 1883. The power of taxation vested in the Legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary therefore in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or de-

fective performance may be cured by the same authority which directed them, provided always that intervening rights are not impaired. Such is the conclusion of numerous adjudications by the State courts upon the effect of curative acts, and of this court in *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Hart* v. *Henderson*, 17 Mich. 218; *Musselman* v. *Logansport*, 29 Ind. 533; *Grim* v. *Weissenberg School Dist.*, 57 Penn. St. 433; 98 Am. Dec. 237. The completion of the assessment-roll in the case at bar before the 1st of September in the years mentioned, and the form of the oath annexed, were not so vital to the assessment itself as necessarily to render the defect arising from a later return or a deficient oath incurable. The completion of the assessment-roll by that date was deemed essential by the court below, because the law required the assessors forthwith to cause notices to be published in three of the public newspapers of the city for twenty days, specifying a day at their expiration when they would meet, and remain in session five days for the purpose of reviewing their assessments on the application of any one aggrieved. The requirement was designed to afford tax payers whose names were on the roll an opportunity for the examination and correction of the assessment of their property. The assessment could not stand if they were deprived of that opportunity. But it is not perceived why it might not be legalized and confirmed by the Legislature giving to them such opportunity after the time originally designated had expired. No just right of the tax payer would thereby be defeated.

The assessment of the shares of the bank for the years 1876, 1877 and 1878 was held invalid for the reason stated, under the laws of the State, although from what we have said it would not be open to objection as being in conflict with the act of Congress. It is only in view of its invalidity for want of conformity to the laws of the State that the Validating Act becomes of importance. That act declares that the assessments contained in the assessment-rolls of the wards of the city for the above years are "in all things legalized and confirmed, subject to the rights of the shareholders, or their personal representatives, in National or State banks which were located in said city, during those years, and the assessments against whom, by reason of their ownership

of such shares, were collected by process of law, to claim a deduction from or cancellation of such assessment." It required the assessors, within ten days after the passage of the act, to publish in the official papers of the city daily for three weeks, Sundays and holidays excepted, a notice to the stockholders that the assessors would be in attendance at their office in Albany for three weeks subsequent to the last day of publication of the notice, and hear applications for the deduction from the assessments of any amount which such stockholders or their personal representatives would have been entitled to deduct under the law as it existed in the year when the assessment was placed on the roll, had such application then been made. And the act provided that such shareholders, or any one representing them, might appear before the assessors, and apply for a deduction or cancellation of the assessment upon any ground which would have been a legal one when the assessment was placed on the roll, and the assessors were empowered to grant such reduction or cancellation as the shareholders would have been legally entitled to at that time. The act also made provision for the collection and payment to the parties of the amount found to be due them, with interest.

It is difficult to see on what plausible ground the validity of this act can be questioned, unless the power of the Legislature to cure by legislative act any irregularities of the assessment be denied. Every right of the shareholder who had paid taxes on the assessment — and it does not appear that there were any others — was secured. He could present any claim he might have for a reduction or cancellation of the assessment, and be heard respecting it. He occupied the same position he would have held if the assessment of his shares had been placed on the assessment-roll within the time required — that is, before the 1st of September — and the oath annexed had been without any fault or omission in its averments. The plaintiff and the other shareholders were bound, as owners of property, to bear their just proportion of the public burdens; and if, in ascertaining what that proportion should be, some steps in the proceeding were omitted which invalidated the assessment, it would seem but just that the defect should be cured, if practicable, and the shareholders not be allowed to escape taxation, and thus entail the burden they should bear

upon other tax payers of the community. After the Validating Act was passed, the plaintiff applied to the assessors for the cancellation of the assessment for the years 1876, 1877 and 1878, or a reduction from the amount assessed. The assessors refused to cancel the assessments, but they allowed a reduction from them to the amount of $2,071.66, which was paid to him.

It follows from the views expressed that the judgment of the Circuit Court must be affirmed, and it is so ordered.

Davenport Nat. Bank v. Board of Equalization, City of Davenport, Iowa, and Others.*

(123 U. S. 83.)

Taxation — constitutionality.

The Iowa statute which taxes savings banks on the amount of their paid-up capital, and does not tax the shares of those banks held by individuals, the same rate being assessed upon the capital of the savings banks as upon the shares of the National banks, and the tax upon the former not being shown to be less than that upon the latter, is not invalid.

IN error to the Supreme Court of the State of Iowa.

A. J. Hirschl and *W. T. Dittoe*, for plaintiff in error.

E. E. Cook, *L. M. Fisher* and *C. A. Ficke*, for defendants in error.

Miller, J. This is a writ of error to the Supreme Court of the State of Iowa. The question presented grows out of the allegation on the part of the bank, which is a National bank located in Iowa, that the shares of its stock are taxed at a rate which is in excess of the taxes levied upon other moneyed capital of the State. The foundation of this allegation is that the statute of the State on this subject taxes savings banks, one of which is in the same town with the plaintiff, on the amount of its paid-up capital,

* Affirming 64 Iowa, 140.

and does not tax the shares of those banks held by the individual shareholders. The case, passing through the proper stages in the State tribunals, was decided by the Supreme Court against the plaintiff.

The proposition of counsel seems to be that the capital of savings banks can be taxed by the State in no other way than by an assessment upon the shares of that capital held by individuals, because, under the act of Congress, the capital of the National banks can only be taxed in that way. It is strongly urged that in no other mode than by taxing the stockholders of each and all the banks can a perfect equality of taxation be obtained. The argument is not conclusive if the proposition were sound; for the act of Congress does not require a perfect equality of taxation between State and National banks, but only that the shares of the National banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that if the capital of the National banks were taxed at a much lower rate than other moneyed capital in the State, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of Congress for the protection of National banks. It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the National banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is that the system of State taxation of its own citizens, of its own banks, and of its own corporations, shall not work a discrimination unfavorable to the holders of the shares of the National banks. Nor does the act of Congress require any thing more than this; neither its language nor its purpose can be construed to go any further. Within these limits the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress.

In the case before us the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the National banks. It does not satisfactorily appear from any thing found in

this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the National banks. It is not necessary, nor a probable inference from any thing in this system of taxation, that it should be so, and it is not shown by any actual facts in the record that it is so. If then neither the necessary, usual or probable effect of the system of assessment discriminates in favor of the savings banks against the National banks upon the face of the statute, nor any evidence is given of the intention of the Legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional. The whole subject has been recently considered by this court in the case of *Bank* v. *New York*, 121 U. S. 138; 7 Sup. Ct. Rep. 826; *ante* 243. In that opinion it was held that while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that because they were exempted from taxation the shares of stock in National banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and as was said in *Hepburn* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113, it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.

It is unnecessary to inquire whether the savings banks of Iowa are based upon principles similar to those of New York, which were the subject of the opinion in *Bank* v. *New York*, for while in that case the savings banks were exempt from taxation, the Iowa statute imposes a tax upon them equal to that imposed upon the shares of the National banks. The whole subject is so fully reviewed and reconsidered in that opinion, delivered less than a year ago, that it would be but a useless repetition to go further into the question.

The judgment of the Supreme Court of Iowa is affirmed.

Lessassier v. Kennedy.

(123 U. S. 521.)

Jurisdiction — transfer of stock — liability of assignor.

On the sale of shares in a National bank, the name of the assignee not having been inserted in the blank left for that purpose in the transfer-book of the bank, and the assignors having been compelled, in a suit brought by a receiver, to contribute as owners of such shares toward the liabilities of the bank, the assignors brought this suit against their assignee to recover the money so paid. *Held*, that the action was not within the jurisdiction of a Federal court.

IN error to the Supreme Court of the State of Louisiana. On motion to dismiss the writ of error for want of jurisdiction.

Action to recover money which plaintiffs had been compelled to contribute toward the liabilities of a bank on account of certain shares which they had previously sold to defendant. The judgment of the Louisiana Supreme Court was in the defendant's favor.

H. C. Miller and *Enoch Totten*, for plaintiffs in error.

W. Hallett Phillips and *J. McConnell*, for defendant in error.

Waite, C. J. At the hearing of this cause a motion was made to dismiss the writ of error for want of jurisdiction, on the ground that no Federal question was involved in the decision below. This motion will be first considered.

The facts as disclosed by the record are as follows: On the 24th of February, 1873, Lessassier & Binder sold to Samuel H. Kennedy at New Orleans, through his broker, E. C. Feinour, forty shares of the capital stock of the Crescent City National Bank, and in accordance with the prevailing custom at that place upon such sales, signed a transfer of the shares sold upon the transfer-book of the bank, leaving the name of the transferee blank. On the 15th of March, Kennedy sold the same stock to Thomas A. Adams, a responsible person, but at the request of the purchaser, the transfer on the books of the bank was made to

Morris Dyer, who was irresponsible, by writing his name in the blank left for the name of the transferee in the assignment which had been signed by Lessassier & Binder. The bank was known to be embarrassed March 14th, and on the 17th of that month it closed its doors and soon afterward a receiver was appointed, under the National Banking Act, by the Comptroller of the Currency. On the 1st of August, 1874, the receiver, by direction of the Comptroller, brought a suit against the shareholders to enforce their individual liability for the debts of the bank, under section 5151, Revised Statutes. To this suit Kennedy was made a party, as the holder of the shares which had been sold to him as above. He appeared and filed an answer, setting up his sale to Adams as a defense. Upon the hearing a final decree was rendered June 2, 1876, dismissing the bill as to him. A suit was then brought by the receiver against Lessassier & Binder, alleging that they were the owners of the stock at the time of the failure of the bank. They notified Kennedy that this suit had been begun, and that if their defense failed they should fall back on him and hold him for whatever amount they might be compelled to pay "on stock which, from February 24, 1873, they had ceased to own and had transferred to him." In the answer of Lessassier & Binder they set up the sale to Kennedy as a defense to the action. At the final hearing a judgment was rendered against them on the pleadings and proofs, May 16, 1879, for $2,800, and interest at five per cent per annum from July 23, 1874. This judgment they paid, and then brought the present suit against Kennedy, to recover from him the amount of their payment. In the petition it was alleged that upon the sale of the stock to Kennedy, and the signing of the transfer on the books of the bank, it became his duty to insert his name in the blank left for that purpose, and that they had been compelled to pay the judgment in favor of the receiver "owing to the conduct of the said Kennedy in not causing his name to be inserted in the transfer-book aforesaid as transferee of said stock, and preserving in said transfer-book of said bank, contrary to his obligation and duty, the said transfer in blank, with your petitioners' name signed thereto, from the time of said sale to him until said * * * bank failed and owing to the other acts of the said * * * Kennedy in the premises

by which he subjected your petitioners to a liability which was his own, and which he should have met; that his said conduct and acts were violative of his obligations in the premises and your petitioners' rights; were unlawful, illegal, and have caused to your petitioners loss and damage to the extent of * * * said amount paid by them."

From this statement of the case it is apparent that the suit was not brought against Kennedy to enforce any liability of his under the National Banking Act. That liability was disposed of in the suit of the receiver against him for its enforcement. Neither do Lessassier & Binder claim under the receiver, nor are they seeking to enforce the liability of Kennedy as a shareholder. Their claim, and their only claim against him is for his failure to insert his own name, or that of some other responsible person, in the blank which had been left by them in the transfer they signed on the books of the bank for the stock he had bought. His obligation to them, if any there is, grows out of his contract with them as a purchaser, and not out of the Banking Law. That presents no Federal question. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which required him to register his ownership for their protection. Neither is it at all important that in its opinion, the Supreme Court of the State expressed a doubt as to the correctness of the judgment against Lessassier & Binder. That judgment as it stood was conclusive on that point, and if Kennedy had been liable to them at all, it would have been for the amount adjudged, because he had been called upon to defend if he desired to do so. He was discharged, not because the judgment was wrong, but because he had not, in the opinion of the court, been guilty of any neglect of duty toward those against whom it was rendered, which would make him liable to them therefor.

The motion to dismiss is granted.

BUTLER v. COLEMAN.*

SAME v. MIXTER.

SAME v. WHITNEY.

SAME v. DEMMON.

(124 U. S. 721.)

Attachment — before judgment — Federal jurisdiction — unlawful attachment — bond for property — validity — action to set aside bond — equity — jurisdiction.

Under U. S. Revised Statutes, section 5242, providing that no attachment before final judgment shall be issued in any State court against a National bank, and U. S. Revised Statutes, section 915, entitling the plaintiff in actions in the Federal courts to similar remedies by attachment to those provided by the laws of the State in which such courts are held, a Federal court may not issue a writ of attachment before final judgment against a National bank.

A bond given to release property from an illegal attachment is void.

The principal in a bond given in an attachment suit may maintain an action in equity to have the bond declared void and the property held by the sureties as indemnity returned.

APPEAL from the Circuit Court of the United States for the District of Massachusetts. In error to the Circuit Court of the United States for the District of Massachusetts.

George Mixter, Henry M. Whitney and Daniel L. Demmon each brought an attachment suit against the Pacific National Bank of Boston, and all obtained judgment. The bank, by Peter Butler, its receiver, brings error. The bank, by its receiver, also brought suit in equity against Lewis Coleman, John Shepard, George Mixter, Lucy E. Prescott, executrix of Calvin B. Prescott, deceased, Henry M. Whitney and Daniel L. Demmon to recover possession of property of the bank deposited with Coleman and Shepard to secure them against loss on account of bonds signed by them as sureties, and given to release property seized on these attachments. The bill was dismissed on the hearing and the receiver appeals.

* Reversing Price v. Coleman, 22 Fed. Rep. 604.

A. A. Ranney, for appellant and plaintiff in error.

Joshua D. Ball, for appellees Mixter and Prescott.

Alfred D. Foster, for appellee Whitney.

Henry Wheeler, for appellee Demmon.

Richard Stone, for appellees Coleman and Shepard.

WAITE, C. J. All of these cases involve the same general question, and they may properly be considered and decided together. From the records it appears that the Pacific National Bank of Boston was an association for carrying on the business of banking, organized under the National Bank Act. On the 20th of November, 1881, it became embarrassed, and was placed in charge of a bank examiner, in whose control it remained until March 18, 1882, when its doors were opened for business with the consent of the Comptroller of the Currency. By statute, in Massachusetts civil actions are begun by original writ, which "may be framed either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or it may be by original summons, with or without an order to attach the goods or estate." Pub. Stat. Mass. 1882, chap. 161, §§ 13, 14. "All real and personal estate liable to be taken on execution * * * may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover." § 38. "A person or corporation whose goods or estate are attached on *mesne* process in a civil action may, at any time before final judgment, dissolve such attachment by giving bond with sufficient sureties, * * * with condition to pay to the plaintiff the amount, if any, that he may recover within thirty days after the final judgment in such action." § 122. At the time the bank resumed business, it was indebted to George Mixter in the sum of $15,000; to Henry M. Whitney also in the sum of $15,000; to Daniel L. Demmon in the sum of $25,000; and to Calvin B. Prescott in the sum of $5,000. On the 24th of March, 1881, Mixter and Prescott each began a suit against the bank in the Circuit Court of the United States for the District of Massachusetts, by writ di-

recting an attachment, to recover the amounts due them respectively. Demmon also began a suit in the same court and in the same way on the 28th of March, to recover the amount due him, and Whitney another on the 28th of April, upon the claim in his favor. At the time these suits were begun, the bank had money on deposit to its credit in the Maverick National Bank and in the Howard National Bank, and the necessary steps were taken to subject these deposits to the attachments which were issued in the several suits. The bank arranged with Lewis Coleman and John Shepard to become its sureties upon bonds to dissolve attachments in any actions that might be brought against it, and placed in their hands a certificate of deposit in the Maverick National Bank for $100,000, to be held as their protection against all liabilities which should be thus incurred. This certificate was afterward exchanged for $121,000 of the bonds of the Nantasket Company, $20,000 of the bonds of the Toledo, Delphos and Burlington Railroad Company and $15,000 of bonds of the Lebanon Springs Railroad Company. Immediately after each of the attachments in the above actions had been made, the bank executed a bond to the plaintiff in a penal sum suited to the amount of the claim, with Coleman and Shepard as its sureties, reciting the attachment, and that the bank "desires to dissolve said attachment according to law," and conditioned to be void "if the Pacific National Bank of Boston shall, within thirty days after the final judgment in the aforesaid action, pay to the plaintiff therein named the amount, if any, which he shall recover in such action." Upon the execution of the bond in each case, the attachment was dissolved. After this the bank closed its doors a second time, and on the 22d of May, 1882, a receiver was appointed by the Comptroller of the Currency in accordance with the provisions of section 5234 of the Revised Statutes, and at once took possession of its assets and proceeded to wind up its affairs. When the receiver was appointed he found the several suits which had been commenced still pending. In the cases of Mixter, Whitney and Demmon he appeared, answered for the bank, filed motions to discharge the attachments, and motions to dismiss the suits. His motions were all overruled, and, his defenses not being sustained, judgments were rendered against the bank in each of the cases for the amounts

found to be due the several plaintiffs respectively. For the review of the action of the court in these cases the writs of error which are now under consideration were brought. The suit of Prescott still remains undisposed of in the Circuit Court. Failing in his motions and in his defenses at law, the receiver filed a bill in equity in the Circuit Court against the several attaching creditors, and the sureties on the bonds given to dissolve the attachments, the object of which was to reduce to his possession the securities which were held by the sureties for their protection against liability, and to restrain the several attaching creditors from enforcing the attachment bonds on the ground, among others, "that the attachments made in said actions were unauthorized, illegal and void." This bill was dismissed by the Circuit Court (22 Fed. Rep. 694), and from that decree the appeal which is now one of the subjects of consideration was taken.

In the view we take of the case, the most important question to be considered is, whether an attachment can issue against a National bank before judgment in a suit begun in the Circuit Court of the United States. Section 5242 of the Revised Statutes of the United States contains this provision: "No attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, county or municipal court." The original National Bank Act contained nothing of this kind, but the prohibition first appeared in the act of March 3, 1873 (chap. 269, § 2, 17 Stat. 603), as a new proviso added to section 57 of the act of June 3, 1864 (chap. 106, 13 Stat. 116). That section was originally as follows: "That suits, actions, and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: provided, however, that all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located." The amending act was as follows: "That section fifty-seven * * * be amended by adding thereto the following: 'And

provided, further, that no attachment, injunction or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any State, county or municipal court.'" Section 52 of the original National Bank Act was as follows: "That all transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except the payment of its circulating notes — shall be null and void." 13 Stat. 115. This was evidently intended to preserve to the United States that "first and paramount lien upon all the assets of such association" which was given by section 47 as security for the repayment of any amount expended by them to redeem the circulating notes, over and above the proceeds of the bonds pledged for that purpose, and to place all the other creditors on that equality in the distribution of the assets of an insolvent bank which was clearly provided for in section 50, where the Comptroller of the Currency is required to make ratable dividends of the proceeds of the assets of the association realized by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." *Bank* v. *Colby*, 21 Wall. 609, 613; 1 Nat. Bank Cas. 109. In the revision of the statutes, section 52 of the original act, and the amendment of section 57 adopted in 1873, relating to attachments and injunctions in State courts, were re-enacted as section 5242, the amendment of section 57 being put in the revision at the end of what had been the original section 52. As the Revised Statutes were first adopted, the proviso of section 57, which related specially to proceedings to enjoin the Comptroller, was re-enacted as section 736, but all the rest of the original section was left out. That omission was however supplied by the act of February 18, 1875 (chap. 80, 18 Stat. 316, 320), which re-enacted it as part of section 5198, put-

ting it at the end of that section as it originally stood in the revision. The fact that the amendment of 1873, in relation to attachments and injunctions in State courts, was made a part of section 5242, shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that as it stood originally as part of section 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against National banks under the authority of the State courts. That was evidently its purpose when first enacted, for then it was part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a State court no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from State courts against National banks, and writes into all State attachment laws an exception in favor of National banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a National bank. The prohibition does not in express terms refer to attachments in suits begun in the Circuit Courts of the United States, but as by section 915 of the Revised Statutes those courts are not authorized to issue attachments in common-law causes against the property of a defendant, except as "provided by the laws of the State in which such court is held for the courts thereof," it follows that, as by the Amendatory Act of 1873, now part of section 5242 of the Revised Statutes, all power of issuing attachments against National banks before judgment has been eliminated from State statutes, there cannot be any laws of the State providing for such a remedy on which the Circuit Courts may act. The law in this respect stands precisely as it would if there were no State law providing for such a remedy in any case. It was suggested in argument that the prohibition ex-

tended only to the use of the remedy by State courts, and that the remedy itself still remained to be resorted to in the courts of the United States. But we do not so understand the law. In our opinion the effect of the act of Congress is to deny the State remedy altogether so far as suits against National banks are concerned, and in this way it operates as well on the courts of the United States as on those of the States. Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances. It was further said that if the power of issuing attachments has been taken away from the State courts, so also is the power of issuing injunctions. That is true. While the law as it stood previous to the act of July 12, 1882 (chap. 290, § 4, 22 Stat. 163), gave the proper State and Federal courts concurrent jurisdiction in all ordinary suits against National banks, it was careful to provide that the jurisdiction of the Federal courts should be exclusive when relief by attachment or injunction before judgment was sought. Until the act of 1882 the Federal courts had ample authority to grant injunctions in proper cases, and all a person need do to invoke that authority was to bring his suit in one of those courts. Whether since the act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary, but this does not shed any light on the interpretation of the old law. The difficulty arises from the change that has been made, not from the law as it stood originally. We are therefore of opinion that the attachments in all the suits were illegal and void, because issued without any authority of law.

But it is insisted that notwithstanding this the bonds are valid and may be enforced. It is undoubtedly true that the sureties on a bond of this kind are estopped from setting up, as a defense to an action for a breach of its condition, any irregularities in the form of proceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attach-

ment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. So too it is no defense that the property attached did not belong to the defendant, or that it was exempt, or that the defendant has become bankrupt or is dead. In all such cases, where there was lawful authority for the attachment, the simple question is, whether the condition of the bond has been broken; that is to say, whether there has been a judgment in the action against the defendant for the payment of money which he has neglected for thirty days afterward to make. In the present case however the question is, whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal and therefore a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment, although not affected by all the contingencies which might have discharged the attachment itself. *Carpenter* v. *Turrell*, 100 Mass. 450, 452; *Tapley* v. *Goodsell*, 122 id. 176, 182. Such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment itself is illegal, and therefore void, so also must be the bond which takes its place. Objections can be made to an attachment issued on proper legal authority, which cannot be used as a defense to a bond taken under the statute for its dissolution; but if there can be no lawful attachment, there can be no valid bond for its dissolution. The case is to be considered as though there was no law whatever for the seizure of property by attachment before judgment in any case. As the taking of the property under such circumstances would be unlawful, so also would be the act of the magistrate in accepting the bond. Neither is the bond binding as a common-law bond. If the attachment had been valid, and the bond taken had not been in all respects such as the statute had required, it could nevertheless have been enforced as a common-law bond, because it was executed for a good consideration, and the object for which it was given had been accomplished. But here the difficulty is that there was no lawful attachment, and therefore no lawful authority for taking any bond whatever. The bond is consequently neither

good under the statute nor at common law, because there is no sufficient foundation to support it.

Objection is made to the relief which is sought in equity, because if the attachment bonds are void there is an adequate remedy at law in the suits that may be brought for their enforcement. If the suit in equity had been brought by the sureties to get rid of their obligation, this objection might be good; but such is not its character. The sureties have in their hands assets of the banks which the receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds. The receiver says there is no liability, because the bonds are invalid; and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them. Such a suit is clearly cognizable in equity. The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds, and the suit, although not brought by them, is in the nature of an interpleader to save them "from the vexation of two proceedings on a matter which may be settled in a single suit." The decree will bind all alike, and if the sureties are held not to be liable, it will conclude the creditors from all further proceedings against them on the bonds, and leave them free to surrender the securities to the receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets of the bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void, the judgments are inoperative as a basis of recovery upon the bonds. The judgment in each of the suits at law is affirmed, but the decree in the suit in equity is reversed, and the cause remanded, with instructions to enter a decree setting aside and annulling the bonds which were given to dissolve the attachment, and enjoining each and all of the creditors, and those claiming under them, from proceeding in any manner to enforce the same against the sureties, and di-

recting the sureties to surrender to the receiver the securities they hold for their indemnity.

Judgment affirmed.

National Bank of Redemption v. City of Boston.

(125 U. S. 60.)

Savings banks — taxation of shares — constitutional law — shares owned by other National banks.

Under Pub. Stat. Mass., chap. 13, § 8, which provides that all bank shares shall be assessed at their cash value, and at no greater rate than other moneyed capital in the hands of citizens, taxes are not invalid, either under Stat. Mass. or U. S. R. S., § 5219, because the tax on savings banks is based on the amount of their deposits, excepting deposits invested in loans secured on taxable real estate.

A tax levied under Pub. Stat. Mass., chap. 13, § 8, is not "at a greater rate than other moneyed capital in the hands of citizens," because disproportionate and unequal to the tax imposed, under Pub. Stat. Mass., chap. 13, relative to the taxation of the corporate franchise of corporations excepting banks, on life insurance companies, based on the number of policies, on trust and like companies, based on the amount of deposits, and on telephone companies, based on the number of telephones used.

Under U. S. R. S., § 5219, which provides that all the shares of any banking association may be included in the valuation of the personal property of the owner or holder in the State within which the association is located, but that each State may determine the manner of taxing the shares of National banks, a State may tax the shares of a National bank owned by another National bank.

IN error to the Circuit Court of the United States of the District of Massachusetts.

Geo. S. Hale and *Chas. W. Wells*, for plaintiff in error.

George F. Hoar and *A. J. Bailey*, for defendant in error.

MATTHEWS, J. This is an action at law brought by the plaintiff in error, a National bank located in Boston, to recover from the city of Boston the amount of $14,464, paid to the tax collector of the city, upon demand, he then holding a tax-list and warrant for

its collection, after a protest in writing; being an amount which it alleges was illegally assessed on its shares at $12.80 per $1,000 of valuation, in violation of section 5219 of the Revised Statutes, of the fourteenth amendment to the Constitution, and of the provisions of the Constitution of the State of Massachusetts. The cause was submitted to the court without the intervention of a jury. Judgment was rendered in favor of the defendant upon an agreed statement of facts. That judgment is brought here upon this writ of error. The tax in question was levied under chapter 13 of the Public Statutes of Massachusetts, relative to the taxation of bank shares, as follows:

"SEC. 8. All the shares of stock in banks, whether of issue or not, existing by authority of the United States or of the Commonwealth, and located within the Commonwealth, shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere, in the assessment of all State, county and town taxes imposed and levied in such place, whether such owner is a resident of said city or town or not; all such shares shall be assessed at their fair cash value on the 1st day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate and no greater than that at which other moneyed capital in the hands of citizens and subject to taxation is by law assessed. And the persons or corporations who appear from the records of the banks to be owners of shares at the close of the business day next preceding the 1st day of May in each year, shall be taken and deemed to be the owners thereof for the purposes of this section.

"SEC. 9. Every such bank or other corporation shall pay to the collector, or other person authorized to collect the taxes of the city or town in which the same is located, at the time in each year when other taxes assessed in the said city or town become due, the amount of the tax so assessed in such year upon the shares in such bank or other corporation. If such tax is not so paid, the said bank or other corporation shall be liable for the same; and the said tax, with interest thereon at the rate of twelve per cent per annum from the day when the tax became due, may be recovered in an action of contract brought by the treasurer of such city or town.

"SEC. 10. The shares of such banks or other corporations shall be subject to the tax paid thereon by the corporation or by the officers thereof, and the corporation and the officers thereof shall have a lien on all the shares in such bank or other corporation, and on all the rights and property of the shareholders in the corporate property, for the payment of said taxes."

From these sections it appears that (1) the shares in National banks are to be assessed at their fair cash value, after deducting therefrom the proportionate part of the value of the real estate belonging to the bank. (2) They are to be assessed at the same

rate and no greater than that at which other moneyed capital in the hands of citizens and subject to taxation is by law assessed. (3) The bank itself, as a corporation, is made liable in the first instance for the payment of the taxes so assessed upon its shares belonging to its shareholders. (4) If not paid when due, the bank is liable to an action for the recovery of the same, brought by the treasurer of the city or town in which it is located, with interest thereon at the rate of twelve per cent per annum from the day when the tax became due. (5) For the payment of said taxes the corporation has a lien on all the shares in the bank, and on all the rights and property of the shareholders in the corporate property, as an indemnity. It further appears, from a comparison of the statutes on the subject, that the action given by section 9, for the recovery of the taxes, with interest at twelve per cent per annum, is the only mode of collection provided in case of default, no power being given to any collecting officer to proceed by distraint or other seizure of the property of the bank or the shares of the stock for that purpose. Chapter 11, Public Statutes of Massachusetts provides that personal property, for the purposes of taxation, shall include goods, chattels, money and effects, wherever they are, money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for, but not including in such debts or indebtedness any loan or mortgage of real estate, taxable as real estate except the excess of such loan above the assessed value of the mortgaged real estate; public stocks and securities; stocks in turnpikes, bridges and moneyed corporations within or without the State; the income from an annuity, from ships and vessels engaged in the foreign carrying trade, and so much of the income from a profession, trade or other employment as exceeds the sum of $2,000 a year; but no income shall be taxed derived from property subject to taxation, and no taxes shall be assessed upon the shares in the capital stock of a corporation organized or chartered in the Commonwealth, which pays a tax upon its corporate franchises, except for school, district and parish purposes. It is not disputed but that under these and other provisions of the law, all personal estate, included within this enumeration, and real estate, are taxable, and were taxed, upon their fair cash value at the same rate of $12.80 for each $1,000 of value levied during

the same period upon shares of capital stock of National banks located in Boston. The amount of personal property in the city of Boston, taxed during that period and at that rate, is stated to be $189,605,672. The aggregate value of shares in National banks in that city for the same year was $60,428,000.

Corporations chartered by the Commonwealth or organized under general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks, are subject to a tax upon their corporate franchises. For purposes of taxation, the law requires the corporate franchise in each case to be estimated at a valuation thereof equal to the aggregate value of the shares in its capital stock. The rate of taxation is determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year, as returned by the assessors of the several cities and towns, upon the aggregate valuation of all the cities and towns for the preceding year. From the valuation of the corporate franchise there is to be deducted, in case of railroad and telegraph companies whose lines extend beyond the limits of the Commonwealth, such a portion of the whole valuation of their capital stock as is proportional to the length of that part of their line without the Commonwealth, and also an amount equal to the value of their real estate and machinery located and subject to local taxation within the Commonwealth; the same deduction as to real estate and machinery being made in case of other corporations. Savings banks are required to pay to the Treasurer of the State a tax, on account of their depositors, of one-half of one per cent per annum on the amount of their deposits, excluding so much of the deposits as are invested in real estate used for banking purposes, or in loans secured by mortgages on taxable real estate, and also for a certain period so much of the deposits as are invested in real estate, the title to which has been acquired by the completion of foreclosure or by purchase, and such deposits so taxed are otherwise exempt from taxation in the hands of their owners. Life insurance companies are required to pay an excise tax at the rate of one-quarter of one per cent per annum upon a valuation equal to the aggregate net value of all policies, in force on the last day of the year next preceding, held by residents of the Common-

wealth. All other insurance companies pay a tax by way of excise of one per cent on all premiums received during the year for insurance, and one per cent on all assessments made by such companies upon policy-holders. The Massachusetts Hospital Life Insurance Company is required to pay a tax upon all deposits, trust funds, or funds held for purposes of investment, except upon deposits invested in loans secured by mortgages on taxable real estate, the same rate of tax imposed upon savings banks on account of deposits; and the same rule applies to all trust companies, safe deposit and trust companies, banking and trust companies, loan and trust companies, and other moneyed corporations incorporated in the Commonwealth. The American Bell Telephone Company is subjected to a franchise tax, based upon an apportionment made upon the number of telephones in use by it, or under its authority, or with its permission, or under letters-patent owned or controlled by it, within and without the Commonwealth, respectively, deducting the market value of all stocks in other corporations held by it, upon which a tax has been assessed and actually paid, either in Massachusetts or in other States, for the preceding year. Savings banks, under the laws of the Commonwealth, are authorized to receive deposits from any person until they amount to $1,000, and to allow interest thereon to be compounded until the principal with the accrued interest amounts to $1,600, no interest to be paid on any greater sum. The deposits are to be invested only as follows: (1) In first mortgages of real estate situated in the Commonwealth to an amount not to exceed sixty per cent of the valuation of such real estate, but not exceeding seventy per cent of the whole amount of deposits. (2) In public funds of the United States and of certain enumerated States and municipal corporations, or in the notes of any citizen of the Commonwealth secured by a pledge of any such securities at their par value. (3) In the first mortgage bonds of certain descriptions of railroad companies, or in the notes of any citizen of the Commonwealth, secured by a pledge of any such securities at not less than eighty per cent of the par value thereof. (4) In certain bank stocks, including the stocks of National banks located in the New England States, or on the notes of any citizen with such bank stocks as collateral security, at not more than eighty

per cent of the market value thereof, and not exceeding the par value thereof, but the amount of such investments in such bank stocks is specifically limited. (5) In loans upon the personal notes of depositors of the corporation, not exceeding one-half of the amount of the deposit, in which case the deposit is held as collateral security for the payment of the loan. (6) If the deposits cannot be conveniently invested in the modes heretofore named, not exceeding one-third part thereof may be invested in bonds or other personal securities payable at a time not exceeding one year, with at least two sureties, all of whom are to be citizens of the Commonwealth and residents therein. (7) Ten per cent of the deposits of any such corporation, not exceeding $200,000, may be invested in the purchase of a suitable site and building for the transaction of its business. (8) Any such corporation may hold real estate acquired by the foreclosure of any mortgage owned by it, or by purchase at sales made under the provisions of any such mortgage, or for the satisfaction of debts due to it, but all such real estate shall be sold within five years after the title is vested in the corporation.

The particular in which the plaintiff in error chiefly insists that the tax imposed upon its shares is at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of Massachusetts is the alleged inequality existing in favor of that imposed upon savings banks. The contrast of which this inequality is the result is stated to be as follows, viz.: That in 1885 a tax of $1,564,995 was collected upon National bank shares in Massachusetts, of the value of $113,000,000, while upon $163,000,000 of savings bank deposits in the same year there was collected as a tax only $815,930. In view of the state of the question, as fixed by the previous decisions of this court, it is not perhaps very material now to inquire whether this alleged contrast between the taxation of National bank shares and of savings banks in Massachusetts is real or only apparent. There are several particulars which might be mentioned, and which, when properly allowed for, would certainly reduce the apparent inequality. There is only one however which we deem it important to notice. The tax on savings banks is based upon deposits merely. This is because deposits furnish the only capital which

is invested and employed. The institutions themselves, although corporations, have no capital stock, and are managed by trustees, not selected by the depositors, but by public authority. The whole amount of the deposits, with the exceptions noted, are subjected to a tax of one-half of one per cent. On the other hand, the National banks pay a tax assessed upon the market value of the shares as personal property, upon a valuation and at a rate exactly equal to that of all other personal property subject to taxation in the State. But shares of the National banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these deposits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the two modes of taxation. The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of National bank shares, was very deliberately considered by this court in the case of *Bank* v. *New York*, 121 U. S. 138, 160; *ante* 265, and the conclusion reached in that case was reaffirmed in the case of *Bank* v. *Board of Equalization*, 123 id. 83; *ante* 285. In the former case deposits in savings banks in the State of New York to the amount of $437,107,501, with an accumulated surplus in addition of $68,669,001, were exempted by the laws of the State from all taxation, neither the bank itself nor the individual depositor being taxed on account thereof. It was said in that case (p. 161): "However much therefore may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in National banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation." It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or those of Iowa considered in the case of the Davenport bank. The princi-

pal distinction indeed, between the case of the New York savings banks and those of Massachusetts, involved in the present inquiry, is that the latter pay a tax of one-half of one per cent on the amount of their deposits, while the New York banks were exempt from all taxation whatever. The argument on behalf of the plaintiff in error indeed seeks to establish another distinction. It is alleged that in Massachusetts, savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to National banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case. A similar objection to the tax in question, founded on a comparison of the taxation of National bank shares with that of insurance companies and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company, is equally untenable. Within the definition of that phrase, established in the case of *Bank* v. *New York*, 121 U. S. 138; 7 Sup. Ct. Rep. 826; *ante* 243, the interest of individuals in these institutions is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State. *People* v. *Commissioners*, 4 Wall. 244; 1 Nat. Bank Cas. 9. It is further contended however, on the part of the plaintiff in error, that the taxation in question is not only at a greater rate than that imposed upon other moneyed capital held by individual citizens, but that it is repugnant to the fourteenth amendment to the Constitution of the United States, because it operates to deny to the tax payer the equal protection

of the laws, and also that it is disproportionate and unequal, in violation of the provisions of the Constitution of Massachusetts. The two branches of this proposition are equivalent; if the tax is not disproportionate and unequal, within the meaning of the Constitution of the State, the tax payer is not denied the equal protection of the laws within the sense of the fourteenth amendment. The point is fully met by the reasoning and judgment of the Supreme Judicial Court of Massachusetts, in the cases of *Institution for Savings* v. *City of Boston* and *Jewell* v. *City of Boston*, 101 Mass. 575, 585.

Another point to be noticed arises upon the third count of the declaration. It is therein alleged that other National banking associations, some located in Massachusetts and others in the several New England States, are the owners of one thousand four hundred and forty-eight shares of the capital stock of the National Bank of Redemption, on which the amount of tax paid was $2,051. It is urged in argument that these shares are not taxable by virtue of section 5219 of the Revised Statutes. The language of the section is:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions: — that the tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It is contended that no tax is thereby authorized upon the National bank itself as a corporation, nor upon the personal property of any such, and that therefore these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This however is not a reasonable interpretation of the language of the section. The manifest intention of the law is to permit the State in which a National bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of

the National banks owning shares of the capital stock of another National bank, by reason of that ownership, on the same footing with all other shares. Other questions have been raised by counsel for the defense. The right of the plaintiff to sue is denied on the ground that the right of action belongs to the owners of the shares taxed; the right of recovery is denied on the ground that the payment by the plaintiff was voluntary, and the right of action, if it exists, it is alleged, is against the collecting officer, and not the city of Boston. These questions we have not considered it necessary to examine or decide, preferring to rest our judgment upon the validity of the tax.

The judgment of the Circuit Court is accordingly affirmed.

BRADLEY, GRAY and BLATCHFORD, JJ., did not sit or take any part in the decision.

WHITBECK v. MERCANTILE NATIONAL BANK OF CLEVELAND.

(127 U. S. 193.)

Taxation — discrimination —deduction of indebtedness.

An order made by the Ohio State board for the equalization of returns of bank shares from the various counties for purposes of taxation, increasing the assessment of shares of a National bank above that of other property in the county, is invalid within U. S. R. S., § 5219, providing against discrimination against such banks in State taxation.

Under U. S. R. S., § 5219, where the laws of a State allow a tax payer owning moneyed capital to make a deduction from the amount assessed against him of his *bona fide* indebtedness, no such provision being made for the indebtedness of holders of bank stock, they are entitled to such deduction, although they omitted to make demand therefor till after the return of the shares for assessment and the session of the State board of equalization.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

Bill in equity by the Mercantile National Bank of Cleveland, Ohio, against Horatio N. Whitbeck, as treasurer of Cuyahoga

county, Ohio, to restrain defendant from collecting a tax levied upon plaintiff. Bill allowed, and defendant appeals.

James Lawrence, *Clarence Brown* and *D. K. Watson*, for appellant.

W. W. Boynton and *John C. Hale*, for appellee.

MILLER, J. This is an appeal from the Circuit Court of the United States for the Northern District of Ohio. The Mercantile National Bank of Cleveland, Ohio, brought this suit against Horatio N. Whitbeck, the appellant here, as treasurer of Cuyahoga county, in that State, in which the city of Cleveland is located, to restrain him from the collection of certain taxes levied upon the shares of the capital stock of that bank. The substantial allegations of the bill are that upon the assessment of the value of the shares of its capital stock for purposes of taxation they were estimated at sixty-five cents on the dollar of their real value in money, while all other personal property in the city of Cleveland and county of Cuyahoga, including the moneyed capital in the hands of individual citizens of said city and county, was estimated at only sixty cents upon the same basis. This occurred in the following manner: The auditor of Cuyahoga county, in accordance with the rules and practice adopted for the valuation of other moneyed capital of individuals, fixed the taxable value of these bank shares at sixty per centum of their true value in money, and certified and transmitted the same to the Annual State Board of Equalization for Incorporated Banks. This board made an order increasing the valuation to sixty-five per centum, which latter value was certified back to the auditor, and by him placed upon the tax duplicate for the year 1885. This was delivered to the defendant, the treasurer of said county, for the collection of the taxes thereon. Another point made by the bill was that while the statutes of Ohio permit the tax payers owning moneyed capital subject to taxation to make a deduction, from the amount assessed against him on account of credits, of the amount of his *bona fide* indebtedness, no such provision is made in regard to the indebtedness of any holder of bank stock. The bill sets up, as af-

fected by this proposition, the names of certain shareholders of the plaintiff bank, who claim that they should be allowed this deduction for their indebtedness upon the taxable value of their bank shares. The case was tried before the circuit and district judges, sitting together, and a certificate of a division of opinion was made, accompanied by a statement of the facts on which the difference arose. A decree was entered in accordance with the opinion of the circuit judge, enjoining the collection of the amount represented by the difference between sixty and sixty-five per centum of the actual value of the stock, and granting the relief asked for by the shareholders, who claimed a deduction on account of their indebtedness, except as to three of them.

As regards the allegation of a discrimination against the stockholders on account of the shares held by them, caused by the increase in the assessment of five per centum made by the State Board of Equalization, the matter is not altogether free from difficulty; but we are of opinion that there is such a discrimination as is forbidden by section 5219, R. S. U. S. It is certainly true that the tax upon personal property, including the moneyed capital of private citizens, in Cuyahoga county, is made upon an estimate of sixty per centum of its cash value in all cases except with regard to bank stocks, and that in regard to these the valuation is fixed upon the same basis at sixty-five per centum. It is probably the fact, as alleged by the counsel for the treasurer, that the State board having these stocks under consideration may have made a truer estimate, and may have equalized their assessed value over the entire State; but this equalization, from the very nature of the functions and powers of that body, merely has reference to bank shares as among themselves; that is to say, its purpose is to make the capital stock of all incorporated banks in the State equal in valuation for the purposes of taxation so as far as relates to their actual cash value. This board has no other power than this; it has no capacity to equalize the valuation of bank shares for taxation as compared with other moneyed capital in the State. Such capital may therefore have a valuation very much below its real value, and even very much below the conventional rate fixed upon bank stocks by the action of this body; and that result almost necessarily follows in this case from the nature of the

powers which have been conferred upon it. While it has the power, and it is made its duty, to take the valuation of bank shares as reported to it by the auditor of Cuyahoga county, and make a comparison between it and the reports of the same character made to it by the eighty other counties in the State, it receives no such report in regard to any other moneyed capital. There is no means furnished it for the purpose of making a comparison of the proportion which the assessment sustains to the true value, as between the banks and the other moneyed capital of the State, in the different counties thereof. While it is not an absolute necessity that this method should result in a discrimination against the National banks, it is one of the probabilities, as has happened in this case, that it may produce such a result which shall be unfavorable to those institutions. Section 2804, Revised Statutes of the State of Ohio, enacts that an annual county board for the equalization of the real and personal property, moneys and credits in each county, exclusive of cities of the first and second class, shall be composed of the county commissioners and county auditor, who shall meet at the office of the latter in each county on the Wednesday after the third Monday in May, annually. It is provided that this board shall have power to hear complaints, and to equalize the valuation of all real and personal property, moneys and credits within the county. It is under this statute that the assessment was made which the auditor certified to the State Board of Equalization. No complaint has been made that this assessment upon the capital shares of the plaintiff bank was in anywise unequal as regards the assessment upon other moneyed capital. The organization and method of proceeding of the State Board of Equalization for incorporated banks is provided for in the following sections of the Revised Statutes of Ohio, 1880:

"SEC. 2808. (As re-enacted March 9, 1883; 80 Ohio Laws, 55.) The Governor, Auditor of State and Attorney-General shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the Auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the State Auditor.

"SEC. 2809. (As amended March 9, 1883; 80 Ohio Laws, 55.) Said board shall hear complaints, and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and

personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a per cent as will equalize said shares to their true value in money; provided, that said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

It is obvious from these two sections that the only power of this board is to diminish or increase the assessed value of the shares of stock by such a per centum as will make them equal among themselves, and that there is no power of equalization so far as other personal property is concerned, or in comparison with other moneyed capital in the hands of individuals. The language directing the board to proceed "according to the rules prescribed by this title for valuing and equalizing the values of real and personal property" does not authorize a comparison of the value of bank shares with that of real and personal property, but is only intended to have regard to the mode of procedure, such as laying before that body the reports of the county auditors, hearing complaints, and equalizing the assessments as between the shares of the different banks. Therefore in the order by which it equalized the various bank shares as among themselves from all over the State, and certified this increase of five per centum upon the assessment to the auditor of Cuyahoga county, it had no purpose to change or to equalize the assessment in its relation to other moneyed capital of the State, of the city of Cleveland, or of the county of Cuyahoga. It is said however that the standard of comparison required by the act of Congress is the assessment of all the banks in the State with that upon moneyed capital all over the State, and that there is no evidence presented in this suit that there was any discrimination against the bank if the standard of comparison here suggested is the one which should govern. There is evidence that the rule which was adopted by the board of equalization of Cuyahoga county fixing the assessment at sixty per centum of the cash value of the property, prevailed in eleven other counties in the State. It is also a fact that in regard to those counties the discrimination against the National banks, as compared with other moneyed capital, is established. This alone would be sufficient to establish a discrimination as to twenty-

three and sixth-tenths mills out of the entire rate of twenty-six mills on the dollar of valuation; it being found as a matter of fact that twenty-six mills was the entire tax levied upon all the property in the county of Cuyahoga under this assessment, of which the amount of twenty-three and six-tenths mills was exclusively devoted to county and city purposes, and but two and four-tenths mills was levied for State purposes. While it might perhaps be plausibly said that in regard to taxation for State purposes, the rule of comparison should include the whole State, it is equally clear that for the much larger proportion of tax levied for county and city purposes the assessment upon the moneyed capital of the citizens in such county and city should furnish the standard by which the inequality of taxation should be determined. As it has already been shown that the board for the equalization of the shares of incorporated banks had neither the authority nor the means to establish and equalize the assessment of the shares of all the banks of the State with the other moneyed capital of the State, we do not very well see how the oral testimony of witnesses offered to establish this uniformity of assessment could do so; and if it could, how it was competent to do it in the face of the fact that the board had no such power.

In regard to the deduction of their *bona fide* indebtedness, claimed on the part of certain owners of shares in the plaintiff bank from the assessment levied upon such shares, the court finds that no demand was made therefor "either by the complainant or by any of its shareholders, until the 17th day of December, A. D., 1855, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law, to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which said deduction can be secured." Under the decision in *Hills* v. *Bank*, 105 U. S. 319; *ante* 45, we are of opinion that the bank was entitled to relief in the cases of all the shareholders named in the bill (ex-

cept James A. Barnett, Robert L. Chamberlain and James Parmalee), and that the fact that they did not make an earlier demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock does not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that "the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which said deduction can be secured." This was precisely the case in regard to *Hills* v. *Bank*, in which this court said: "We are of opinion that considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could and might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deduction for debts would be made in the valuation of bank shares for taxation. It is therefore not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid." In regard to all of the shareholders claiming this deduction except Barnett, Chamberlain and Parmalee, the court finds that the allegations of the bill are true, but that as to them they are untrue. It therefore granted relief by the injunction as to all of them except these three, as to which it was denied. It is to be observed however that the bank takes no appeal from the part of the decree denying relief to these three shareholders.

These principles require the affirmance of the decree of the Circuit Court; and while there will be found in them a sufficient answer to the questions certified by the judges of that court, we do not think it necessary to make a more specific answer to each of them.

The decree is affirmed.

BUNDY v. COCKE.

(128 U. S. 185.)

Equity — jurisdiction — liability — married women as stockholders of insolvent bank.

A bill to enforce against the separate estate of a married woman an assessment upon shares of National bank stock, is not open to the objection that it does not allege that she had capacity to become a stockholder, whether she became such before or after marriage, where it alleges that she was the owner of the shares, and where a statute of the State in which the bank is located (Dig. St. Ark. 1874, § 4194) provides that a married woman may transfer her property, carry on any business, and perform any services on her separate account, and that her earnings shall be her separate property, and may be used or invested by her in her name.

The bill alleging that the married woman is possessed of property in her own right sufficient to pay the assessment, and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee or executor, the case is one of equitable cognizance.

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky. Bill by Martin L. Bundy, receiver of the Hot Springs National Bank, against William M. Cocke, and Amanda M., his wife, and James Flanagan, and Sue, his wife, to enforce an assessment upon shares of bank stock held by the married women defendants. Mrs. Cocke having died, complainant filed a bill of revivor against her husband. Demurrers to both bills were sustained. Complainant declined to amend and appeals from a decree of dismissal.

John Mason Brown, *Alex. P. Humphrey* and *George M. Davie*, for appellant.

B. F. Buckner, for appellee.

BLATCHFORD, J. On the 4th of February, 1885, Martin L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, in the State of Arkansas, filed his bill of complaint in the Circuit Court of the United States for the District of Kentucky, against William M. Cocke and Amanda M. Cocke, his wife,

and James Flanagan and Sue Flanagan, his wife, all of the defendants being alleged in the bill to be citizens of Kentucky. The bill alleges that on the 1st of March, 1884, the bank was a corporation created and organized under the National Banking Statutes, with a capital stock of $50,000, divided into five hundred shares of $100 each at their par value; that it had its office of discount and deposit in the city of Hot Springs in the State of Arkansas; that it suspended the business of banking on the 27th of May, 1884; that the plaintiff was duly appointed receiver of the bank on the 2d of June, 1884; and that on the 25th of July, 1884, the Comptroller of the Currency determined that it was necessary to enforce the individual liability of the shareholders in the bank, to the amount of fifty per centum of the par value of its capital stock, "and did make an order and requisition on the stockholders, and each and every one of them, equally and ratably, as the shares were held and owned by them, respectively, at the time said bank suspended and ceased to do business," and directed the plaintiff "as such receiver" to take the necessary legal proceedings to enforce such assessment against the shareholders in said bank, and each and every one of them. The bill then contains the following allegation: "And your orator would further state that on the 27th day of May, A. D. 1884, when said bank suspended and ceased to do business, Amanda M. Cocke, wife of William M. Cocke (both of whom are made defendants hereto), was the owner of one hundred shares of the capital stock thereof, of the par value of $10,000, and the same still stands in her name on the books of the said association, on which the equal and ratable assessment and requisition made by the Comptroller as aforesaid is $5,000, with interest thereon from the said 25th day of July, 1884; that said defendant Amanda is possessed of property in her own right amply sufficient to pay said assessment, but utterly refuses to do so." Then follows a like allegation as to Mrs. Flanagan, as the owner of twelve shares of the stock. The prayer of the bill is that an account be taken of the shares of stock held by each of the married women defendants, respectively, at the date of such suspension, and the assessment and requisition made by the Comptroller of the Currency thereon, and that a decree be made for the payment thereof out of the separate property held

by the married women defendants in their own right, as each may be found indebted, with interest. Mr. and Mrs. Cocke filed a demurrer to the bill for want of equity and also for multifariousness. The plaintiff then amended the bill by striking out the names of Flanagan and his wife as defendants; and in July, 1885, he filed a bill of revivor, based on the fact of the death of Mrs. Cocke in March, 1885. The bill of revivor alleges that when Mrs. Cocke died, she was a citizen of Kentucky, and was domiciled and resident therein; that she left a will whereby her husband was appointed her sole executor, and her sole residuary legatee and devisee; that the will had been duly proved and recorded in the proper court in Kentucky; and that Mr. Cocke had accepted the terms of the will, and taken upon himself the office of such executor. The bill prays for the revival of the suit against Mr. Cocke, as devisee and legatee of his wife, and as sole executor of her will, and for relief against him out of all assets received or held by him as devisee or legatee of his wife, or as executor of her will. Mr. Cocke appeared and filed a demurrer to the bill of revivor, for want of equity. The cause was heard on the demurrer to the bill and the demurrer to the bill of revivor. The court sustained both of the demurrers, giving to the plaintiff time to amend his bill, and he declining to do so, a decree was entered dismissing it. From that decree the plaintiff has appealed.

From the opinion of the court, accompanying the record, the ground of dismissal appears to have been that the bill was defective in not alleging that at the time Mrs. Cocke became a stockholder she had the capacity to become a stockholder. But we think the bill is not open to this objection. It alleges that at the time the bank suspended, Mrs. Cocke "was the owner" of the one hundred shares. This is an allegation that she was then the lawful owner of those shares, and had lawfully become such owner, with the capacity to become such owner at the time she became such owner. It is consistent with this allegation that she may have owned the shares before she married Mr. Cocke, or that when she became such owner, if she was then the wife of Mr. Cocke, she had the right to become such owner by virtue of the laws of the State of Arkansas, where the bank was located, in connection with the provisions of the statute of the United States in regard

to National banks. Section 4194 of the Digest of the Statutes of Arkansas, published in 1874 (chap. 93, p. 756), provides as follows:

"SEC. 4194. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

Under this provision, if it was in force at the time of the transaction, it would seem that Mrs. Cocke, when a married woman, might lawfully have either subscribed for or taken an assignment of the shares, they being shares of a National bank in Arkansas, and the transaction being therefore governed by the statutes of Arkansas, unless, under special circumstances, a rule ought to govern. *Milliken* v. *Pratt*, 125 Mass. 374; 28 Am. Rep. 241. As the bill alleges that Mrs. Cocke is possessed of property in her own right amply sufficient to pay the assessment, and as the prayer of the bill is for a decree for the payment of the amount of the assessment out of the separate property held by her in her own right, and as the bill of revivor prays for relief against Mr. Cocke out of the separate property held by her in her own right, and as the bill of revivor prays for relief against Mr. Cocke out of the assets received by him as the legatee or devisee of his wife, or as executor of her will, the case is clearly one of equitable cognizance, because it does not appear that she could be sued at law, to reach her separate property. 3 Pom. Eq. Jur., § 1099. The original bill and bill of revivor are sufficient on their faces to call upon Mr. Cocke to answer them, and when all the facts bearing upon the case are fully developed, the rights of the parties can be properly adjudicated. For that reason we refrain from considering any of the other questions discussed at the bar. The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to overrule the demurrer to the original bill and the demurrer to the bill of revivor, and to take such further proceedings as may be proper, and not inconsistent with this opinion.

NATIONAL SECURITY BANK v. BUTLER.*

(129 U. S. 223.)

Insolvency — preference.

The Pacific Bank of Boston, not being a member of the clearing-house, used to deposit with the Security Bank all checks received by it to be collected through the clearing-house, and was credited by the latter bank as a depositor. The directors of the Pacific Bank, having one Saturday, after closing, determined to go into liquidation, dispatched a committee to Washington to confer with the Comptroller of the Currency as to the appointment of a receiver. The appointment was made about ten A. M. on Monday. Monday morning the cashier of the Pacific Bank sent the checks and drafts received by mail to the Security Bank, and with them his check for the whole amount of the bank's deposits, for which he received a negotiable certificate of deposit of the Security Bank. The latter at the time held the Pacific Bank's negotiable certificate of deposit. The transaction occurred about half-past nine A. M., when no officer of the Security Bank knew or suspected that the Pacific Bank was insolvent. *Held*, that the cashier must have presumed that the Security Bank still held its certificate of deposit, and that in sending to it the checks and drafts, he was making a transfer which necessarily gave a preference, and was void under § 5242, U. S. R. S., and the Security Bank therefore could not set off the Pacific Bank's certificate of deposit against its own.

ERROR to the Circuit Court of the United States for the District of Massachusetts. The opinion states the case.

J. C. Coombs and *Russell Gray*, for plaintiff in error.

A. A. Ranney, for defendant in error.

BLATCHFORD, J. This is an action at law, brought in the District Court of the United States for the District of Massachusetts, in November, 1882, by the receiver of the Pacific National Bank, a corporation duly organized under the Banking Laws of the United States, against the National Security Bank, another corporation so organized. The declaration contains three counts. The first count alleges that the Pacific National Bank became insolvent and failed; that the Comptroller of the Currency, on the 22d of May, 1882, appointed the plaintiff, Linus M. Price, re-

* Affirming 22 Fed. Rep. 697.

ceiver of the same; that the bank stopped business and closed its doors on the 20th of May, 1882, being insolvent and unable to pay its debts; that steps were on that day taken to represent it to said Comptroller as insolvent, and to have a receiver appointed to close it up; that it was determined, on the 20th of May, 1882, not to open its doors or carry on business longer; that on that day the Security Bank was owing to the Pacific Bank, in account, as balance on books, $40.25, and the former bank also held against the latter a certificate of deposit for $10,000; that on the 22d of May, 1882, the Pacific Bank, through its cashier, although it was then insolvent and contemplated insolvency, and had then actually failed and stopped business, and taken said steps for the appointment of a receiver, transferred and delivered to the Security Bank certain checks, drafts, bills and other property, amounting on their face to the sum of $10,967.95, which, with the said $40.25, made the sum of $11,008.20; that the Security Bank thereupon gave to the cashier of the Pacific Bank a certificate of deposit as follows:

"No. 6216. NATIONAL SECURITY BANK, BOSTON, *May* 22, 1882. $11,008.20. E. C. Whitney, cash., has deposited in this bank eleven thousand and eight 20-100 dollars, payable to the order of himself on the return of this certificate properly indorsed. CHAS. R. BATT, *Cashier.*"

That the Security Bank collected the money upon the said checks, etc.; that the said certificate of deposit came to the hands of the plaintiff as receiver, among the other assets of the Pacific Bank; that on a demand made by him the Security Bank refused to deliver or pay the said property, or its avails, claiming a right to set it off or apply it on the said certificate of deposit for $10,000; that on the 20th day of May, 1882, the Pacific Bank was insolvent; that it, and its directors and officers, well knew the same, and contemplated insolvency; that it was in the same condition on the 22d of May, 1882; that the said transfer of property to the Security Bank was in fraud of the creditors of the Pacific Bank, with a view of giving the former bank a preference over other creditors, by having the same operate as a payment of the debt due to the Security Bank by the Pacific Bank, by way of set-off or otherwise; that the said transfer was illegal, and, if allowed to operate as a set-off or payment, would work

an unlawful preference; and that the Pacific Bank and its officers and cashier well knew, when the transfer was made, that the property, or its proceeds, when collected, would or might be availed of for the payment of the debt due the Security Bank, by way of set-off or otherwise, and contemplated the same, or was bound and is presumed by law to have contemplated and intended the same. The second count of the declaration alleges the giving of the certificate of deposit for $11,008.20; that the plaintiff, as receiver, presented to the Security Bank said certificate, duly indorsed, and demanded payment thereof; but that the defendant refused to pay it. The third count alleges that the defendant owes to the plaintiff as receiver, $11,008.20, as and for money had and received by the defendant to the use of the plaintiff. The declaration demands the recovery of $11,008.20, with interest. The defendant filed an answer and a declaration in set-off. The substance of these papers is that the defendant has a claim in set-off against the Pacific Bank for the amount of the certificate of deposit of the latter bank for $10,000, which was as follows:

"$10,000. THE PACIFIC NATIONAL BANK OF BOSTON, MASS., BOSTON, *May* 18, 1882.

This certifies that there has been deposited in this bank of ten thousand dollars, payable to the order of Nat. Security Bank, on return of this certificate properly indorsed. No. 2513.

[Countersigned] G. H. BENYON, *Teller*. E. C. WHITNEY, *Cashier*."

The plaintiff put in an answer to the defendant's declaration in set-off, making substantially the same averments which are contained in the first count of the plaintiff's declaration. On these issues there was a trial by a jury, which resulted in a verdict for the plaintiff for $12,232.88, and a judgment for him for that amount, with costs. The case was taken to the Circuit Court by the defendant by a writ of error, and it affirmed the judgment of the District Court, with costs. The opinion of the Circuit Court is reported in 22 Federal Reporter, 697. The plaintiff brought the case to this court by a writ of error, and afterward Peter Butler, as successor of Price, as receiver, became plaintiff in error.

There was a bill of exceptions taken by the defendant in the District Court. It states that the three counts of the plaintiff's

declaration were all for the same cause of action, and that the right of action contained in the first count was founded upon section 5242 of the Revised Statutes. That section provides as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any National banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof — made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes — shall be utterly null and void."

That section is incorporated in the Revised Statutes from section 52 of the act of June 3, 1864, chap. 106 (13 Stat. 115). The two sections differ in these respects: The word "transfer" becomes "transfers"; the words "and other" become "or other;" the words "any association" become "any National banking association;" the words "with a view to prevent" become "made with a view to prevent," and the words "this act" become "this chapter." No change was made in the meaning of the statute by inserting in section 5242 the word "made," not found in section 52 of the act of 1864.

The bill of exceptions states that it was admitted at the trial that the $40.25 was on deposit in the Security Bank before the commission of any act of insolvency by the Pacific Bank, and that as to so much of the plaintiff's claim the set-off was a good answer. As to the rest of the claim, the following facts were proved or admitted: "On Saturday, May 20, 1882, the Pacific Bank, which had previously failed in November, 1881, and had afterward reorganized and done business, being deeply insolvent, its directors held a meeting in the afternoon, after the regular close of business for the day, and passed these votes, which votes and the proposed action the directors purposely kept concealed until they were carried out: 'Voted to go into liquidation; voted that the bank be closed to business; voted that Lewis Coleman, president, Micah Dyer, Jr., Andrew F. Reed, directors, and William J. Best, be and hereby are ap-

pointed a committee to proceed to Washington to confer with the Hon. John J. Knox, Comptroller of the Currency, as to the measures proper to be taken in the present situation; that if the Comptroller shall deem it necessary to appoint a receiver, the directors unanimously recommend for that position Mr. E. C. Whitney, who since March 18th has discharged the duties of cashier with great ability, diligence, and energy, and who is perfectly familiar with the assets, liabilities and affairs of the bank, and thoroughly understands the steps necessary to be taken to speedily and profitably realize upon the estate to the fullest extent; that if Mr. E. C. Whitney shall be appointed receiver of the bank, the directors will furnish satisfactory bonds for the faithful discharge of his duties to any amount which the Comptroller may require.' And the bank never after did any business except so far as appears in this bill. The committee of the directors went to Washington on Saturday night, and on Monday, May 22d, saw the Comptroller, who appointed the plaintiff receiver about ten o'clock, A. M., and the plaintiff left Washington on Monday, and on the following day arrived in Boston, and took possession of the bank. For some time before this, and ever since the resuscitation of the bank after its first failure, the Pacific Bank, not being a member of the Boston clearing-house, had been in the habit daily of depositing with the defendant all checks received by the Pacific Bank, to be collected through the clearing-house by the defendant, with which the Pacific Bank was credited as a depositor, and against which it drew. On Monday morning, May 22, Whitney, the cashier of the Pacific Bank, received by mail, as usual, many letters inclosing drafts and checks, and sent all these checks and drafts, amounting to $10,967.95, to the defendant bank, where they were received, and forthwith sent to the clearing house, with other checks, to be cleared by defendant. The messenger who carried the checks to the defendant took at the same time and presented to the defendant a check drawn by Whitney for $11,008.20, being the whole amount of the checks then deposited, and $40.25 already to the credit of the Pacific Bank on its current deposit account with the defendant. The defendant's paying teller, at the messenger's request, gave him the defendant's negotiable certificate of deposit, pay-

able on demand, for the said sum of $11,008.20. The defendant at that time held the negotiable certificate of deposit of the Pacific Bank, payable on demand, for $10,000." The copies of those certificates are hereinbefore set forth. "These transactions took place as early as half-past nine on the morning of May 22d, and no officer of the defendant bank then knew or suspected that the Pacific Bank was insolvent or contemplating insolvency, or was not doing business as usual, or that its directors had voted to close it, or that application was to be made for a receiver, and no application had, in fact, at that time been made to the Comptroller, it being made about ten A. M. of that day." The parties had duly demanded of each other payment of their respective claims.

The bill of exceptions also states as follows: "There was other evidence given in the case on both sides, and particularly on the question whether any, and if any, what agreement was afterward made between Whitney, the cashier of the Pacific Bank, and Batt, the cashier of the defendant bank, as to the terms and conditions on which the deposit made on May 22, as above stated, should be held by the defendant, part of this evidence consisting of a letter from Whitney to Batt." It then proceeds: "The defendant requested the judge to submit to the jury the three following questions: *First*, whether or not there was in fact any view or intent on the part of the Pacific Bank, or any of its officers, to give a preference to the defendant over other creditors, or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the Bank Act; *second*, whether or not any subsequent agreement was made varying the relation of the two banks as they existed at the time the checks were deposited; *third*, if the jury answer the preceding question in the affirmative, whether or not such agreement was expressed in Whitney's letter. The defendant at the same time prayed the judge to give several rulings on matters of law applicable to the facts as they might be found by the jury on the above issues. But the judge refused to submit the above or any questions whatever to the jury, or to give any of the rulings prayed for, on the ground that the issues were immaterial and that there was no question for the jury, and ruled as matter of law, that on the undisputed facts in the case the plaintiff was entitled to recover the

amount of the checks and drafts deposited by the Pacific Bank in defendant's bank on Monday." The court directed a verdict for the plaintiff for $12,232.88, that being the amount of the checks and drafts, with interest from the date of the writ, and the defendant excepted to such rulings and refusals to rule.

The view taken by the Circuit Court was that under section 5242 the transfer or payment by a bank, to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view to prevent the application of its assets as provided by law, or with a view to giving a preference to one creditor over another; that the undisputed facts of the case showed that the act of the cashier could, under the circumstances, have no other result, if allowed to stand, than to operate as a preference in favor of the Security Bank; that the Pacific Bank had decided to close its doors and go into liquidation; that after that the necessary consequence of the transfer was to create a preference; that it could not be said that the transfer was made with the intention of going on in business, nor could it be contended that it was made to save the credit of the bank; and that after the vote of the directors to close the bank and go into liquidation, any transfer of its assets to a creditor, whereby that creditor secured a preference, must be presumed to be made with an intent to prefer. We concur in this view of the case.

The directors of the Pacific Bank held a meeting on the afternoon of Saturday, May 20, 1882, after the regular close of business for that day, and passed three votes: (1) To go into liquidation; (2) that the bank be closed to business; (3) that the president, two directors and another person be a committee to go to Washington and confer with the Comptroller of the Currency as to the measures proper to be taken, and that if the Comptroller should deem it necessary to appoint a receiver, the directors unanimously recommended for that position Mr. Whitney, the cashier, and that if he should be appointed receiver, the directors would furnish satisfactory bonds for his faithful discharge of the duties, to any amount which the Comptroller might require. These votes and the proposed action the directors purposely kept concealed. The bank never afterward did any business, except so far as appeared in the bill of exceptions. The committee of the directors

went to Washington on Saturday night, and on Monday, May 22, 1882, saw the Comptroller, who appointed Mr. Price to be the receiver, about ten o'clock, A. M., and he left Washington on Monday, and on Tuesday arrived in Boston and took possession of the bank. Although the Pacific Bank, not being a member of the Boston clearing-house, had been in the habit of daily depositing the checks received by it with the defendant to be collected by the latter through the clearing-house, the Pacific Bank being credited as a depositor, and drawing on the Security Bank against the checks; and although it was in accordance with that custom that Mr. Whitney, the cashier of the Pacific Bank, sent the checks and drafts amounting to $10,967.95, to the Security Bank on Monday, May 22, 1882, to be cleared by it, drawing for the $11,008.20 at the time, and receiving in return, on its own request, from the Security Bank a negotiable certificate of deposit of that bank, payable to the order of Mr. Whitney, on the return of the certificate properly indorsed — yet Mr. Whitney knew at the time of these transactions that the certificate of deposit for $10,000, given by him to the Security Bank nine days before, created an indebtedness of the Pacific Bank to the Security Bank for that amount, and was, though negotiable, presumably still held by that bank. It was in fact still held by it. The natural presumption was, that if the certificate was still held by the Security Bank, that bank would as soon as it should learn that the Pacific Bank was closed to business, seek to retain out of the collections the amount of such certificate and apply that amount to its payment. It is sufficient, under section 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by chapter 4, title 62, R. S., or with a view to the preference of one creditor to another. Certainly the transfer in question was made in contemplation of insolvency — made as it was after the directors had voted that the bank should go into liquidation and should be closed to business and that a receiver should be appointed; and it was made with a view on the part of the Pacific Bank and of its cashier, who represented it and acted for it in this transfer of its assets, to prevent the application of its assets in the

manner prescribed by such chapter 4 of title 62, and with a view to prefer the Security Bank to other creditors. The transaction, if allowed to stand, could result in nothing else. The statute made it void, although there was no such view on the part of the Security Bank in receiving the transfer of the assets, and although there was no knowledge or suspicion at that time on the part of the Security Bank that the Pacific Bank was insolvent, or contemplated insolvency, or was not doing business, or that its directors had voted to close it, or that application was to be made for a receiver, and although the transfer took place before the application was actually made to the Comptroller for the appointment of a receiver. There was no question of fact to be submitted to a jury. From the facts proved, the intent to prefer on the part of the Pacific Bank was a necessary conclusion, and it was correct in the District Court to direct a verdict for the plaintiff. If any other verdict on the facts proved had been rendered, it would have been the duty of that court to set it aside.

Nor was there any error on the part of the District Court in refusing to submit to the jury the second and third questions which the defendant requested the judge to submit to them. The bill of exceptions does not set forth what the "other evidence" given in the case was, in regard to any subsequent agreement between the cashiers of the two banks, as to the holding of the deposit by the Security Bank. The court ruled that the issues involved in such second and third questions were immaterial, and this court cannot hold otherwise on the facts set forth in the bill of exceptions. "Any subsequent agreement" must have been made after the receiver had been actually appointed, and could not affect his rights. The defendant objects that the rulings of the District Court were made, and the verdict and judgment were rendered generally, on the plaintiff's declaration of three counts; and that the first count, which seeks to recover back the money deposited as an unlawful payment, is inconsistent with the second count which seeks to recover on the certificate of deposit as a valid instrument. It is a sufficient answer to this contention to say that no objection was made to the declaration by way of demurrer or otherwise, at the trial or before, and no ruling on the subject was asked for at the trial, or was made the subject of an

exception. No objection or exception was taken to the verdict, nor did the defendant request at the trial that the plaintiff should elect on which count he would ask a verdict, nor did the defendant request the court to ask the jury to state on which count of the declaration the verdict was rendered. We see no inconsistency between the first and second counts of the declaration. They were in substance for the same cause of action, and the first count is clearly sufficient to support the verdict.

Judgment affirmed.

CASES DECIDED

IN THE

COURTS OF THE SEVERAL STATES.

MILLER v. HEILBRON.

(58 Cal. 133.)

Taxation — shares — California Code.

The provision of section 3640 of the California Political Code, as amended March 22, 1880, so far as it applies to National banks, is in violation of section 5219, U. S. Rev. Stat., forbidding the taxation of National bank shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

APPEAL from a judgment for plaintiff.

A. S. Hart, Attorney-General, *C. L. Jordan* and *H. L. Buckley*, for appellant.

Geo. Cadwalader, for respondent.

MCKINSTRY, J. This controversy was submitted upon the following agreed statement:

"Whereas, doubts exist as to the rights of said defendant to collect the State, county and debris taxes upon shares of stock in the National Gold Bank of D. O. Mills & Co., come therefore, Nancy Miller, who is the owner and holder of four hundred and forty-seven shares of the capital stock of said bank, and said A. Heilbron, who is the tax collector of said county in which said

bank is located, and agree upon the facts herein stated, and submit them to the court, that the rights and duties of the parties hereto may be judicially determined.

"1. The National Gold Bank of D. O. Mills & Co. is a banking corporation created pursuant to the laws of the United States in relation to the creation and organization of National banks with a capital stock of $300,000, divided into three thousand shares of $100 each.

"2. Jos. W. Houston, the assessor of said county for the year 1880, assessed said bank upon its real estate only, at the full cash value of such real estate, said bank claiming that its other property was not subject to taxation under State authority.

"3. For the same year said assessor assessed the aforesaid four hundred and forty-seven shares of Nancy Miller in manner following, to-wit: He first ascertained the aggregate market value of the whole three thousand shares of said bank, and deducted from such aggregate value the value of all property assessed to said bank, to-wit: The aforesaid amount at which he had assessed the real estate of said bank. The remainder after such deduction was then divided by the aforesaid total number of the shares of said bank, and thus the *pro rata* value of each share was ascertained after such deduction as aforesaid. The plaintiff, Miller, was then assessed for all her said shares at such *pro rata* value.

"4. For the same year said assessor assessed all the several banking corporations, and other corporations located in said county and organized under the laws of California, upon all their real and personal estate, at the full cash value of said property.

"5. For the same year said assessor assessed the shares of shareholders of said State banks and State corporations in the same manner as he assessed the said shares of said plaintiff Miller, except that in making the deduction mentioned, he deducted the value of all property assessed to said banks, being the whole amount of both real and personal estate, which had been assessed to said State banks and State corporations.

"6. That the rate of the aforesaid taxes for the year 1880 in said county was one dollar and thirty-five cents on each one hundred dollars' worth of property. That said Miller was assessed

in the same year for real estate in said county at the sum of ten thousand dollars, and on miscellaneous personal property other than said bank shares, the sum of one thousand dollars. The tax on said miscellaneous personal property was thirteen dollars and fifty cents, and on said real estate was one hundred and thirty-five dollars. The tax on said bank shares was five hundred and twenty-five dollars and one cent. On the 23d day of December, 1880, plaintiff tendered to said tax collector the sum of one hundred and forty-eight dollars and fifty cents as payment of said taxes on said real estate and said miscellaneous personal property, which tender said tax collector refused unless the plaintiff should also pay the taxes aforesaid levied on said four hundred and forty-seven shares of stock. Plaintiff has not since paid or offered to pay said tax on said shares of stock.

"The matter in controversy is this: Plaintiff claims that said tax upon her said shares of stock is contrary to law, and is therefore illegal and void; and defendant claims that the same is lawful, and therefore good and valid. There is no controversy between them in relation to the validity of the aforesaid tax upon the real estate and miscellaneous personal estate of plaintiff, the purpose of this agreement being to obtain a decision as to the validity of the said tax upon said National bank shares.

"7. That in every instance (during said year 1880) of the assessment of banks doing business in the county of Sacramento, and organized under the laws of the State of California the value of the property assessed thereto was found to be equal to the value of the capital stock of such bank, and hence no assessment was made against said shares of capital stock, or for the value of the shares therein held by the shareholders.

"8. The foregoing stipulation is made subject to the following objections and exceptions:

"I. Plaintiff objects to the following language in subdivision 2 of said stipulation, to-wit: 'Said bank claiming that its other property was not subject to taxation under State authority' on the grounds of irrelevancy and immateriality.

"II. Defendant objects to the fourth, fifth and seventh subdivisions of said stipulation upon the grounds:

"First. That the facts therein stated are irrelevant and immaterial.

"Second. That it is not competent to attack the determination of the assessor as to the assessable value of said shares of stock in this action, or otherwise than by an appeal to the Board of Equalization.

"Wherefore the parties hereto respectfully pray that the controversy may be judicially determined, and that the court render such judgment and grant such relief in the premises as is lawful and proper."

It is conceded that the power to levy a tax upon the shares of the National bank owned by plaintiff is derived from a section of an act of Congress which reads:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent according to its value, as other real property is taxed." (U. S. R. S., § 5219, p. 1015.)

In *People* v. *Weaver*, 100 U. S. 543; 2 Nat. Bank Cas. 57, the words "other moneyed capital" were construed to mean money capital invested otherwise than in National banks.

Section 1 of article 13 of the State Constitution provides:

"All property in the State not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership, provided that growing crops, property used exclusively for public schools and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to *bona fide* residents of this State."

The Legislature has enacted: "In assessing solvent debts not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to *bona fide* residents of this State." (Pol. Code, § 3628.)

Section 3640 of the Political Code — as the same stood when plaintiff's shares were assessed — established the mode by which shares of the capital stock of corporations, associations and joint-stock companies (including National banks) should be assessed. That section then read:

"Each person, firm or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association or joint-stock company, shall be assessed therefor. If the corporation, association or joint-stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations and joint-stock companies whose principal place of business is not within the State must be individually assessed for such stock. Shareholders, in the statement required by section 3629 of this Code, shall specify the number of shares of stock held by them and the name of the corporation. The owner of shares of stock to be entitled to the reduction provided for in the section, must produce to the assessor a certificate of the assessment of the property of the corporation, association or joint-stock company."

In *People* v. *Weaver*, *supra*, the Supreme Court of the United States held that the restriction in the act of Congress — "the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc. — means something more than that there should be no discrimination with respect to the percentage on any valuation which might be made; but that — taking the assessment, rate of assessment and valuation together — the taxation on shares of National banks should not be greater than on other moneyed capital.

In making his assessment of plaintiff's shares in the National bank the assessor was obliged to pursue the mode prescribed in section 3640 of the Political Code, and could not deduct from their valuation debts due from here to citizens of the State.

"Credits" are declared to be property by the State Constitution. They are property in which other "moneyed capital" is invested than such as is invested in National bank shares. Yet as we have seen, the State law, enacted as permitted by section 1 of article 13 of the Constitution, requires the assessor in assessing credits, to deduct therefrom all debts due by the party assessed to *bona fide* residents of the State.

Here is clearly a discrimination against the owner of National bank shares and in favor of the owner of credits. The former is assessed at a greater rate than is the latter.

A section of a statute of New York relating to taxation, provided that if any person should make affidavit that the value of the real estate or personalty owned by him, after deducting his just debts, * * * did not exceed a certain sum, to be specified in the affidavit, it should be the duty of the board of assessors to value such real or personal property at such sum and no more.

Another statute, after declaring that no tax should be assessed upon the capital of any bank — State or National — but that the stockholders should be taxed on the value of their shares of stock, provided, "in making such assessment there shall be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided, further, that nothing herein contained shall be construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and in the same manner as other real estate is taxed."

A citizen and resident of New York who had been assessed upon certain shares of a National bank, in the manner provided in the law of that State, last above referred to, made affidavit in accordance with the law first mentioned. He demanded of the board of assessors that the valuation on his shares should be reduced to $1 — the sum fixed by his affidavit as the balance of value. The board of assessors refused to make the reduction. Out of these facts arose the action, *People* v. *Weaver*, *supra*. The case went to the Supreme Court of the United States. There Mr. Justice MILLER, speaking for the court, said: "It cannot be disputed — it is not disputed * * * that the effect of the State law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxa-

tion, while he whose money is invested in shares of bank stocks can make no such deduction."

The foregoing language is applicable to the case before us. So far as the immediate question is concerned, there is but one difference between the law of New York and the law of this State — a difference of degree. There every person who had money invested in any personal property, except in shares of National or State banks, could have his just debts deducted from the assessment of such personal property; here, he who has his money capital in "credits," obtains a deduction to the extent of his just debts due residents of the State. It will be observed that by the law of New York a class of investments — to-wit, in shares of State banks — was subject to the same taxation as shares in National banks. But the Supreme Court of the United States held the statute of New York, which attempted to deprive the owner of National bank shares of the right of deduction accorded to the owners of all other personal property, except shares in State banks, to be invalid, because in excess of the restricted power of legislation derived by the State from the section of the act of Congress hereinbefore quoted. In *People* v. *Weaver*, that court held, in effect, that by the act of Congress power to tax was conferred on the State, with the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital.

It would seem to be unnecessary to add that the restriction operates upon State legislation, and therefore the fact whether, in a particular instance, the owner of National bank shares owes any debts is immaterial. By the law of this State he is not permitted to deduct them if he does owe any.

There is another reason why section 3640 of the Political Code — as the same read when the facts transpired out of which this controversy arose — so far as it is applicable to the taxation of shares of a National bank, conflicts with the act of Congress. That section provided for taxing his shares to each person owning any of the shares of the capital stock of any corporation, association or joint-stock company — including incorporated National banks. It provided, further, that the assessable value of each share should be ascertained by taking from the market value of

the entire capital stock of the corporation the value of all property assessed to the corporation, and dividing the remainder by the entire number of shares. None of the personal property of a National bank can be assessed to the bank under any law of the State, while the personal property of a State bank (other than United States bonds) may be, and is assessed to such bank. Thus a reduction is allowed in ascertaining the assessable value of the shares of State banks which is not allowed in ascertaining the assessable value of the shares of a National bank. It is obvious therefore that the valuation of shares, "in the hands of individuals," of an incorporated State bank (where the value of personal property belonging to such bank has been deducted from the value of the entire capital stock), must be proportionately less than the value of shares of an incorporated National bank, belonging to individuals. It is no sufficient answer to this suggestion to say that by the State law the personal property belonging to a State bank was assessed to the bank, and so the tax thereon was indirectly paid by the individual shareholders. The restriction of the United States statute is that the taxation to the individual "owner or holder" of shares of a National bank shall not be at a greater rate than is assessed upon any other moneyed capital "in the hands of individual citizens of the State." It would be a strained interpretation of the statute to hold that a proportionable part in value of the personal property belonging to a State bank, and assessed to it, was "in the hands" of an individual shareholder in such bank. It was in the power of Congress to confer upon the State the right to tax shares in National banks with any limitations deemed proper. It has conferred the right to tax each individual owner of such shares, provided such taxation is not at a greater rate than is imposed upon any other individual who has moneyed capital invested in any other manner.

If the Code had provided that the value of all the shares of a National bank should be assessed to such bank, the provision would be in excess of the power conferred by the act of Congress, and could not be upheld upon the proposition that the tax was indirectly imposed upon the shareholders. Without doubt then the act of Congress, by its terms, recognizes a distinction between taxation to the bank and taxation to the shareholders. The

former is prohibited, the latter is permitted. So far as corporations are concerned, the subject of taxation, in respect to which the taxation must be ratably the same, are the shares of National banks and the shares of State corporations — in such case "in the hands of individuals." In view of the language employed in the act of Congress, a tax imposed upon a corporation is not the equivalent of a tax imposed upon its shareholders.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred; ROSS, J., concurred upon the ground first discussed by Mr. Justice MCKINSTRY.

HINES v. MARMOLEJO.

(60 Cal. 229.)

Interest — agreement on rate.

Under U. S. R. S., § 5197, and section 1918, California Civil Code, the National banks in California may charge and receive such rates of interest as may be agreed upon.

APPEAL from a judgment for the plaintiff in the Twentieth District Court of the county of Santa Clara. BELDEN, J.

S. F. Leib, for appellant.

S. J. Hinds, for respondent.

ROSS, J. The sole point made by the appellants in this case is that in this State a National bank has no right to charge or receive a higher rate of interest upon money loaned than seven per cent per annum. Section 30 of the National Banking Act provides:

"Every association organized under this act may take, receive, reserve and charge on any loans * * * interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this act. And when no rate is fixed by the laws

of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum."

By the first clause of this section National banks are authorized to charge and receive interest at the rate allowed by the laws of the State or Territory where the bank is located, and by the last clause, when no rate is fixed by the laws of the State or Territory, they are allowed a rate not exceeding seven per centum. Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word "fixed," used in the last clause, is used in the same sense as the word "allowed" in the first clause, and that by the words "the laws of the State or Territory" is meant statute laws. In other words, that the true interpretation of the act of Congress is that in those States and Territories having no statute upon the subject of interest the National banks are allowed a rate not exceeding seven per centum, while in those States and Territories having a statute on the subject they are authorized to charge and receive interest at the rate allowed other banks and individuals. From this view it follows that inasmuch as we have in California a statute (Civil Code, § 1918), providing "that parties may agree, in writing, for the payment of any rate of interest, and it shall be allowed according to the terms of the agreement until the entry of judgment," the National banks are also allowed to charge and receive such rates of interest as may be agreed on.

We do not find any of the authorities cited by either of the parties to this controversy directly in point, but think the views here expressed find support in the case of *Tiffany* v. *Nat. Bank of Missouri*, 18 Wall. 409; 1 Nat. Bank Cas. 90; and are not in conflict with the decision in *Johnson* v. *Nat. Bank of Gloversville*, 74 N. Y. 329; 30 Am. Rep. 302; 2 Nat. Bank Cas. 302.*

Judgment affirmed.

SHARPSTEIN, MCKEE, THORNTON, JJ., MORRISON, Ch. J., and MYRICK, J., concurred.

In Farmers' Nat. Gold Bank v. Stover, 60 Cal. 332, it was said: "Assuming for the purposes of the demurrer, that the bank knowingly took and was paid a greater rate of interest than that allowed by the law of the State, that did not constitute a defense to the action, either by way of set-off or payment of the promissory note in suit. 'The remedy given by the statute for the wrong,' say the Su-

* Reversed, 104 U. S. 271.

preme Court of the United States, in Barnet v. Nat. Bank, 98 U. S. 555; 2 Nat. Bank Cas. 18, 'is a penal suit. To that the party aggrieved must resort. He can have redress in no other mode or form of procedure.' And in Nat. Bank of Auburn v. Lewis, 81 N. Y. 15, *post*, it was held, that in an action brought to recover the amount of a promissory note discounted by a National bank, it is not allowable to set up by way of counter-claim or set-off, that the bank in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than allowed by law. The remedy in such a case is to recover back twice the amount paid.

"Besides in Hinds v. Marmolejo, 60 Cal. 229, *ante*, we have held that National banks in this State may have, charge and receive such rate of interest as may be agreed upon in writing pursuant to section 1918 of the Civil Code."

KEYSER v. HITZ.

(2 Mackey, 473.)

Savings bank — conversion into National — evidence — consent — stock certificates. Married woman's liability as stockholder — party.

Under the act of Congress of June 30, 1877, a savings bank organized in this district under the General Incorporation Acts of May 5, and June 17, 1870, R. S. D. C., § 553, may convert itself into a National bank.

The certificate of the Comptroller of the Currency is conclusive as to the regularity of such proceedings.

A shareholder of a corporation is estopped to deny the existence of such corporation.

The consent of the owners of more than two-thirds of the stock of a bank is sufficient for the conversion of the bank into a National bank.

On the conversion of a bank into a National bank, it is not necessary to issue new stock certificates.

Under the Married Woman's Act of 1869, Revised Statutes, D. C., a married woman may hold National bank stock, and is individually responsible as a stockholder, as if she were single, and this is true of stock acquired from her husband. In a suit to enforce such liability it is not necessary to join the husband.

THE case is stated in the opinion.

Elliott & Robinson, for plaintiff.

Enoch Totten, for defendant.

Cox, J. On the 24th of September, 1872, the German-American Savings Bank was incorporated under the General Incorpo-

ration Acts of May 5 and June 17, 1870, with a capital of $127,000.

On the 21st of January, 1876, John Hitz transferred to the defendant, Jane C. Hitz, his wife, one hundred and seventy-three shares of the stock of that bank, of the par value of $17,300.

On the same day, Wm. F. Mattingly transferred ten shares, R. B. Donaldson, ten shares, and C. E. Prentiss, seven shares, of the stock to Mrs. Hitz, thus making her the owner of two hundred shares, of the par value of $20,000.

In further proof of the ownership, three checks were put in evidence, dated respectively, May 1, 1876, November 1, 1876, and May 1, 1877, each for $800, signed by C. E. Prentiss, cashier, in favor of Mrs. Hitz, for dividends upon the stock in her name, all apparently indorsed by her to her husband.

On the 7th day of May, 1877, a paper was signed apparently by all the stockholders, including Mrs. Hitz, authorizing and empowering the trustees to change and convert the savings bank into a National banking association, under acts of Congress in such case made and provided, and to execute the articles of association and organization certificate required by the statute, etc., the new bank to bear the name of the German-American National Bank of Washington.

On the 14th of May, 1877, J. S. Langworthy, acting Comptroller of the Currency, executed the certificate required by law, that the German-American National Bank of Washington is authorized to commence the business of banking as provided in section 5169, Revised Statutes.

It does not appear that any new stock-book was opened, or new certificates of stock issued in the name of the new bank, but the books of the old bank were transferred to the new, and the stockholders in the old, were assumed to be stockholders in the new bank.

Sworn lists of these stockholders of the German-American National Bank were from time to time furnished to the Comptroller of the Currency, in conformity with law, all of which included Mrs. Hitz's name.

On the 20th of October, 1878, the German-American National Bank of Washington failed and suspended payment, and the

plaintiff was appointed receiver of the bank, by the Comptroller of the Currency.

On the 11th of June, 1880, the Comptroller certified that upon an examination of the affairs of the bank, he found it necessary to enforce the individual liability of the shareholders of the bank, as provided by act of Congress, and thereupon ordered and made an assessment upon them to the amount of $100 per centum of the par value of the shares held by them respectively. On the same day the receiver notified Mrs. Hitz of this assessment and requested payment of $50 on each share of her stock within thirty days, and $50 more within sixty days, and these payments not having been made, the receiver instituted this suit against Mrs. Hitz, to recover the sum of $20,000.

The defendant filed pleas: 1. That she was never indebted; 2. That she never owned or held any stock of the German-American National Bank; 3. And that she is and has been, since August 5, 1856, a *feme covert*.

To the third plea, plaintiff replied that the stock was the property of the defendant, owned by her in her own right, with the consent and permission of her husband.

The defendant by leave filed a fourth plea denying the existence of such a corporation as the German-American National Bank.

At the trial the court directed a verdict for the defendant.

The first question made in argument here relates to the legality of the conversion of the savings bank into the National bank. It is maintained for the defense that there is no authority of law for such conversion.

Section 5154, Revised Statutes, enacts:

"That any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a National association," etc.

This applies in terms only to banks in the States where they are organized under general laws, and if the term "special law" is not confined to State laws, it would not embrace the case of a bank organized under a general law of Congress, as was the case with the German-American Savings Bank of this District. But by act of Congress of June 30, 1876, it was enacted that:

"All savings or other banks, now organized, or which shall hereafter be organized in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to National banking associations, so far as the same may be applicable to such savings or other banks; provided that such savings banks now established shall not be required to have a paid-up capital exceeding one hundred thousand dollars."

It might be a question whether this act does not, by its own operation, and without the necessity of any action by the banks, convert them at once into National banks, or at least engraft upon their charters all the features of a National bank, not inapplicable to or inconsistent with them, of which the individual liability of shareholders would be one.

Such has not been the practical interpretation of the law, but it has been supposed at least to authorize the conversion of the banks in this District into National banks, and this interpretation has been acted on repeatedly.

It is maintained here however, that the provision in the Banking Act for the conversion of other banks into National banks is not applicable to savings banks.

The reasoning on the subject is entirely theoretical and founded on the difference in the objects and operations of the two kinds of banks. The question however will have to be determined by an interpretation of the acts of Congress, and it seems to us to be very clearly determined by the proviso, above cited, in the act of June, 1876, taken in connection with the prior acts.

The Banking Act provides, with reference to associations originally organized under it, "that no association shall be organized under this title with a less capital than $100,000." R. S., § 5138.

Section 5154, which provides for the conversion of existing banks into National banks, enacts that,

"no such association shall have a less capital than the amount prescribed for associations organized under this title."

A capital of $100,000 was made a condition precedent to the original organization of a National bank, and to the conversion of another bank into one. The requirement of such a capital by the act is for no other purpose, and has reference to no other object.

Then the proviso in the act of June 30, 1876, that such savings banks, now established (*i. e.*, in this District), shall not be required to have a paid-up capital exceeding $100,000, necessarily assumes and implies that the conversion feature in the National Banking Act, which requires such capital, would be applicable to such savings banks in the District of Columbia. It would have, otherwise, no meaning. It is substantially an enactment that the laws relating to National banks, including the conversion provision, shall be applicable to savings and other banks in this District, except that savings banks now existing shall not be obliged to have a capital of $100,000 in order to be converted into National banks.

We are satisfied therefore that it was competent for the German-American Savings Bank to avail itself of the provision in the law for conversion into a National bank.

And the certificate of the Comptroller of the Currency is conclusive, according to the decision of the Supreme Court in *Casey* v. *Galli*, 94 U. S. 673; 1 Nat. Bank Cas. 142, as to the regularity of the proceedings by which that conversion was effected.

We may add, that according to the same decision, where a shareholder of a corporation is called upon to respond to a liability as such, he is not permitted to deny the existence or the legal validity of such corporation. It is not therefore open to the defendant to rely upon this defense, if she is in the position of an ordinary shareholder in this bank.

Mrs. Hitz was a shareholder in the savings bank, as far as the books and transfers show. Excluding Mrs. Hitz, the owners of more than two-thirds of the stock consented to the conversion into a National bank, and such conversion, according to the statute, took place without reference to her concurrence. She then became entitled to an equivalent amount of stock in the National bank. It would perhaps have been more regular for a new stock-book to be opened and new certificates to be issued in the name of the National bank. There is however nothing in the law prescribing the form of the stock-book or of the certificates of stock, and we see nothing to prevent the new bank from treating the old books and certificates as sufficient evidence of title in the new concern. Neither the rights nor liabilities of the stockholders could be affected by the mere omission to issue a new form

of stock certificate to them. To hold otherwise would be to allow all the stockholders to escape liability, by the mere omission of the formality of issuing the shares in a new form.

All this is clear enough when applied to shareholders in the savings bank, who were, *sui juris*, capable of consenting and who actually did consent to the change.

But suppose the case of a shareholder who did not consent, or was not capable of consenting, to the conversion, and who did not in fact receive any certificate of stock in the new bank. Although, without his consent, the legal metamorphosis of the bank might be complete, could he be properly considered a stockholder in the new bank? For example, Mrs. Hitz received no certificate of stock in the new bank, nor is any act of her shown in connection with it after its organization. If she became a stockholder in it at all, it must have been in virtue of her consent that her original stock should be converted into stock of the National bank. If she could consent to this, she was as much a stockholder in this new bank as the other original shareholders of the savings bank, notwithstanding any omission to issue new certificates. If not, it would be difficult to make out her membership in the new concern. How far, then, was she capable of giving that consent?

As to part of this stock, to the amount of $2,700, it was, *prima facie*, acquired during marriage, otherwise than by gift or conveyance from her husband. It may be that he paid the consideration for it, and that it was really his gift, but that is not the present aspect of the case.

As to this much of the stock, then, under the Married Woman's Act of 1869, her right to it was as absolute as if she were unmarried; she could convey, devise and bequeath it in the same manner and with like effect as if she were unmarried, and might contract, sue and be sued in her own name, in all matters having relation to it, in the same manner as if she were unmarried. If so, she could consent, like a *feme sole*, to its conversion into National bank stock, and take that in exchange for it, with all the incidents of such ownership.

We have little difficulty, then, in holding upon the present showing, that *quoad* this stock, the defendant was a *feme sole* and

sui juris, and is amenable to all the consequences of its ownership and conversion which a *feme sole* would be, including the liability asserted in this action.

The larger part of the savings bank stock was transferred to the defendant immediately by her husband.

We see no legal difficulty in the way of the husband's making this transfer, so as to vest the legal title to his wife.

With his assent, she might acquire title by purchase from strangers, and except where it interferes with the rights of his creditors, there is no reason why he may not transfer the legal title to any of his property into her name, except that at common law a conveyance of realty could not be made directly from him to her. He however may have his own shares of stock canceled and new ones issued to his wife, and her title will be the same as if they were derived from a stranger. She has the legal capacity to receive gifts, may be the obligee of a bond or receive a transfer of stock in moneyed corporations, and this, though the consideration may have proceeded wholly from the husband, and in such case she may hold against the legatees and heirs, but not against the creditors of the husband. *Fisk* v. *Cushman*, 6 Cush. 20; 52 Am. Dec. 761. If however this property is not given to her sole and separate use, which I assume to be the case here, because there is nothing to indicate the contrary, it would still be subject to the husband's common-law rights. Stock of an incorporated company is a chose in action. The husband has but a qualified property in it — a right to reduce it to his possession by transferring it into his own name or selling it. A mere collection of the dividends would not be a reduction to his possession of the principal. *Burr* v. *Sherman*, 3 Bradf. 85.

But until it is reduced to his possession it remains the wife's property, and survives absolutely to her on her husband's death before her.

But, on the other hand, the wife cannot, during coverture, transfer her own choses in action of her own motion. And if Mrs. Hitz undertook, on her own responsibility, to convert her shares of savings bank stock, given to her by her husband, into National bank shares, all which involves a transfer of choses in action, in which the husband has a qualified property, it would probably have to be held a void proceeding.

Yet it must be deemed settled law that a wife may transfer her choses in action, with the consent of her husband.

It has been held, for example, that a bill of exchange or promissory note, payable to a married woman, may be indorsed in her own name, and the title passed, with the husband's consent. *Menkins* v. *Hernight*, 17 Mo. 287; *McLain* v. *Weidmeyer*, 25 id. 364.

A transfer in exchange for other choses in action would seem to be clearly within the same rule.

If therefore Mrs. Hitz acted with her husband's consent, in agreeing to convert her savings bank stock into National bank stock, of which the fact of their uniting in the same power of attorney, for that object, would seem to be evidence, we have a regular and legal acquisition by her of the stock of the German-American National Bank.

Does the usual consequence of that ownership devolve upon her, as to that part of the stock which she holds, only as a married woman would hold it, at common law, *i. e.*, the personal liability to be assessed for losses to the amount of the par of the stock?

Section 5151, Revised Statutes, provides that:

"The shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof."

We can conceive a state of facts to which this would not apply, even where one is a nominal shareholder. If, for instance, the stock had been transferred to Mrs. Hitz, and the subsequent change made in the bank without her knowledge or consent, it would be a very forced construction of the law which would extend it to such a case. But we assume for the argument, that the contrary was the case, since evidence was admitted without objection, tending to show that she received dividends on the stock and consented in writing, as a stockholder, to the change.

The statute contains no exception, in terms, in favor of married women. It seems hard and therefore difficult to conceive that Congress intended that a married woman, acquiring her stock, it may be under marital influence, and also unable to alien it her-

self, should yet be held liable, in consequence of that ownership, to make good, out of her other estate, losses resulting from failure of the bank.

Yet we find even a harder case clearly enacted in the statute:

"Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own name." R. S., § 5152.

So that a young ward, whose guardian invests in National bank stock, without his knowledge or consent, and even where he is incapable of assenting at all, is liable, in his other estates under the individual liability clause in the statute.

This very difficulty was considered by the Court of Appeals of New York, in the case entitled *In the Matter of the Reciprocity Bank*, 22 N. Y. 15, which arose under a statute of New York relating to State banks, similar to the United States statute, and in substantially identical terms.

The court said: "The Legislature, if it had thought proper to do so, might have made an exception in favor of married woman, but no such exception was made. It is said that Mrs. Lansing, being under the disabilities of coverture, could not make a transfer of her shares and so avoid this liability, if she had wished to do so. This is a circumstance which might have been properly addressed to the legislative discretion if, indeed, the Legislature had any discretion, under the injunction of the Constitution, but it does not authorize the courts to allow an exemption where neither the Constitution nor the law has declared any. It is also said that *femes coverts* are not liable to suit at common law; and, in general, this is true. It is also true that the apportionment of liability among stockholders in banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the Legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding as other shareholders in banks are made liable. This we think has been done in order to effectuate the policy in which the constitutional provision and the statute are founded. It might

go far to defeat that policy, if married women could take and hold stock without liability to creditors."

In the same case, in the Supreme Court of New York, reported in 29 Barb. 382, it had been laid down that "married women could own stock in bank in their own right both at common law and under the statute of 1848 (of New York), and the Legislature had the power to alter the common law so as to make them personally liable to the amount of their stock. It has thought proper to do so, and we are bound in this, as in all other cases to enforce their liability."

In the case of *Anderson* v. *Line*, in the United States Circuit Court for the Eastern District of Pennsylvania, reported in 14 Fed. Rep. 405, it appeared that shares of stock in a National bank were transferred by a husband directly to his wife, as in this case, and that suit was instituted against her and her husband. And the court held that the coverture did not exempt her from the liability imposed by the National Currency Acts upon all stockholders in National banks.

So that whatever authority exists on this question is all in the direction of the *feme covert's* liability. It is obvious, as suggested in the New York case, that to maintain an exemption of married women from liability would greatly facilitate an evasion of the individual liability clause and the practice of frauds against creditors. It would only be necessary for husbands to put the stock in the names of their wives.

Again, section 5139 provides that a transferee of stock shall succeed to the rights and liabilities of the prior holder. If a married woman transfers the stock, and she is not liable, it might be held that her transferee is equally exempt. These are some of the serious difficulties in the way of sustaining the exemption of married women as shareholders.

In a general way, some of the cases speak of the liability of the shareholder as a contract liability, from which its non-existence is argued in favor of persons not competent to contract to assume that liability. But it will be found that the terms "contract liability" are used in the sense of being a liability which will survive against the estate, instead of dying with the person, as would a liability for a mere tort. In our view however, and that is evi-

dently held in the case already referred to, it is a liability imposed by statute, as an incident to the ownership of the stock, and attaching to all who are capable of that ownership, and without reference to any supposed voluntary assumption of the liability by express or implied contract. And as this is a statutory and not a common-law liability, imposed upon the *feme covert* as a shareholder, it seems to us, as was also held in 29 Barb., *supra*, that it affects her alone, and we think that suit is properly brought against her without joining her husband, which would be necessary in the enforcement of any common-law obligation or liability of the wife.

The court below having held the wife's coverture a protection to her, it follows from the views before stated, that a new trial must be ordered.

Continental National Bank v. Folsom.

(78 Ga. 449.)

Jurisdiction — action on attachment bond. Constitutional law — service on surety of non-resident.

A National bank may be sued in a State court on an attachment bond.

The provision of Code of Georgia, § 3354, that in a suit on an attachment bond, service of notice on the resident surety is service on his non-resident principal, is not unconstitutional.

APPEAL from Atlanta City Court.

Mynatt & Howell, for plaintiffs in error.

R. Arnold, *F. A. Arnold* and *E. N. Broyler*, contra.

Hall, J. The Continental National Bank sued Folsom and Campbell Wallace, on an attachment bond, which is as follows:

"Georgia, Fulton County.

"We the Continental National Bank of New York, principal, and ———— ————, security, acknowledge ourselves bound unto L. B. Folsom in the sum of fifteen hundred dollars, subject to the following conditions: That the said Continental National Bank of New York, principal, is seeking an attachment

against the said L. B. Folsom, which is now about to be sued out, returnable to the June Term, 1881, City Court of the city of Atlanta, district and county aforesaid: Now if the said bank, principal, shall pay all damages that the said L. B. Folsom may sustain, and also all costs that may be incurred by him in consequence of suing out such attachment, in the event that the said plaintiff shall fail to recover in said case, then this bond is to be void.

[L. S.] "CONTINENTAL NATIONAL BANK OF NEW YORK,
"By G. A. HOWELL, its Attorney at Law.
"CAMPBELL WALLACE. [L. S.]

"Executed in presence of C. D. WOODSON, Notary Public, Fulton Co., Ga., this fifteenth day of December, 1879."

The defendant filed a plea to the jurisdiction, to the effect that it is a National bank of the United States, having its being and doing business under a charter granted pursuant to acts of Congress, and by virtue thereof it is not liable to suit anywhere, except in the courts of the United States, within the district where established, and in the State and municipal courts therein having jurisdiction in similar cases, and that it is not located in the State of Georgia and county of Fulton, but in the State of New York, and in the city and county of New York. Afterward the plea was amended to the effect that the said bank had not been served with process or otherwise in said case, "unless service on said defendant, Campbell Wallace, as security, as set out in the declaration in said case, under section 3354 of the Code of Georgia, be held to be legal service on the defendant, which the defendant denies, and says that said section of the Code is unconstitutional, and the pretended service on the defendant is illegal."

The plea and amended plea were both stricken on demurrer, and the jurisdiction retained, and error is assigned on that judgment. So that the first question made by this record is, whether on an attachment bond given by the plaintiff in attachment, with local surety thereon, given as a condition precedent to his procuring the writ of attachment under the statutes of this State, it cannot be sued for damages, incurred by breach of the bond, in the courts of this State, but must be sued thereon within the State and county where it is located to do business; or in other words, whether the laws of the United States restrict the jurisdiction wherein the National banks, created under them, can be sued to courts within the States and districts where they are severally located, in a case where the bank sought the forum or venue to bring a suit itself,

and in order to sue there voluntarily gave a bond as a condition precedent to bringing that suit and broke that bond, and is sued for that breach.

The second question is, whether service upon it by serving its surety within the State, provided by the statutes of the State in such cases, is legal service upon the bank, in such a suit for breach of the bond brought against principal and surety under the Constitution of the State.

The first question depends entirely upon a construction of the statutes of the United States relating to these National banks in respect to the courts wherein they may be sued. In the Revised Statutes, section 5136, par. 4, it is declared that they have power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." This section is nowhere altered, and in no particular amended, by any addition to itself in any subsequent legislation of Congress; but there is an addition by way of amendment to section 5198, that reads as follows:

"That suits, actions, and proceedings against any association under this title, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." U. S. R. S. (2d ed.), § 5198; Supp. to R. S., p. 141.

If this amendment of the 18th of February, 1875, had been designed to change the jurisdiction given by section 5136 to all courts, as fully as those courts have jurisdiction over natural persons, and to confine it to a particular territory or locality, in all cases of grievance whatsoever of these banks, the question suggests itself, why was it annexed as an amendment to section 5198, and not to the jurisdictional section of 5136? Section 5198 treats only of interest beyond that allowed these banks, and provides for the recovery, by the person from whom such interest is exacted, of twice the entire interest paid. So that, as amended, the section as it now reads would make it apply to suits for the recovery of the forfeiture of double the interest paid, where usury is exacted, and would confine the change of jurisdiction granted in section 5136 to those suits, and no others. The words "under this title," may well be construed to describe the sort of association — that is, as *descriptio personæ;* and the words "in similar

cases" be construed as referring to cases like those indicated in this section 5198. Why appended to section 5198, and not to 5136 of the Revised Statutes, unless restricted to suits within section 5198? Reference to the act itself (chap. 80, p. 316, 18 U. S. Stat. at Large) will make the point much stronger. The act is entitled "An act to correct errors, and to supply omissions in the Revised Statutes of the United States," and it amends the sections of the entire Code, known as the Revised Statutes, severally, section by section, beginning with section 65 of that Code, and ending with 5515; and it enacts that each section is amended in a particular way; and when section 5198 of the Revised Statutes is reached the language used is the following:

"Section five thousand one hundred and ninety-eight is amended by adding thereto the following: 'That suits, actions, and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States, held within the district in which such associations may be established, or in any State, county or municipal court in the city or county in which said association is located having jurisdiction in similar cases.'"

The amendment is of this section — none other — so far as appears from the words of the act, and, it seems to us, should be restricted to cases arising under the section so amended. The section giving jurisdiction generally is untouched in words by this amendment; and the question is, shall the jurisdiction, broad as that of natural persons, granted in section 5136, be totally changed in all cases by an amendment of a section that treats only of one class of cases? Are there any words in the amendment that necessarily imply the repeal of the grant by section 5136 of the jurisdiction of all courts, Federal and State, by this amendment of a single section, not on the subject of jurisdiction at all, but on but one class of suits for the recovery of usurious penalties? We cannot so see, nor would we so misconstrue the amendment to section 5198, unless we are controlled by some decision of the Supreme Court of the United States thereon. In *Casey* v. *Adams*, 102 U. S. 66; 2 Nat. Bank Cas. 102, that court does appear to have given it a broader construction, and to extend the scope of this amendment to transitory actions generally, and not to confine it to actions for usurious penalties. The chief justice, in delivering the opinion, says: "The Federal question in this case is, whether a

National bank can be sued in a State court, in a local action, in any other county or city than that where the bank is located." So it would appear that the mind of the court was upon the single point whether a local action could be maintained upon section 5198. It is strongly intimated, *arguendo*, that transitory actions cannot be brought, except as provided in this amendment; for it is said that "by section 5198, Revised Statutes, it is provided that suits, actions and proceedings against any association under this title (The National Banks) may be had," etc.; and then it is added: "This, we think, relates to transitory actions only, and not to such actions as are by law local in their character," thereby implying that it does relate to all transitory actions. Then the court, in that case, through the chief justice, goes on to argue that the case pending is local, and could be brought against the bank in a State court in Louisiana, because it related to property in the parish of La Fourche, which had been sold under process of a State court, and the proceeds were for distribution there, and the question was a conflict of privileges among creditors. The mind of the court was never directed to the fact that this restriction of jurisdiction, as given by section 5136, was by an amendment of section 5198 alone, and not by amendment of the jurisdictional section 5136. It is construed as if it had always been a part of that section made contemporaneously with section 5136.

The principle there decided however is clearly that section 5198, as it now stands, does not apply to local actions at all, and therefore that it cannot be construed as taking away the general grant *in toto*, because it distinctly excepts that large class of cases *in rem*, and not only those, but all relating thereto, touching the proceeds of property, and proceedings against the bank as defendant to issues made thereon. There is no exception of local actions at all in the amendment. It covers "suits, actions and proceedings," without exception, and in *Casey* v. *Adams* the court held that it did not necessarily embrace all, and thereby declared it not to be law, as respects some actions, suits and proceedings, and in that particular proceeding against the bank, that it did not apply, because it would be wholly unreasonable if applied to suits that from their nature could be better tried as a natural person, under section 5136 of the Revised Statutes, than under this

amendment to section 5198. And it might well be so decided, because the amendment is not imperative. The word "may," and not "must" is used in section 5198, as amended. If held to repeal section 5136, and to annul the jurisdiction therein given, certainly no such doubtful word as "may" could have been used, but the unmistakable "must" would have been employed in its stead. Further, the amendment would have expressed exclusive jurisdiction in the courts named in the amendment, had it been intended to embrace all cases, and to exclude all courts except those named. See section 629 of the Revised Statutes, pars. 10 and 11, where original, but not exclusive, jurisdiction is granted under title "Judiciary," chap. 7, § 711 *et seq.*, where exclusive jurisdiction is granted. In the one the words used are, "shall be exclusive of the courts of the several States;" in the other, "shall have original jurisdiction," are the words used, which do not give jurisdiction exclusive of State courts, because words saying so, beyond cavil, are not used. The word "may," being merely permissive, cannot possibly be construed to mean that exclusive jurisdiction was meant in this amendment, but concurrent only. *Claflin* v. *Houseman*, 93 U. S. 130; *Cooke* v. *Bank*, 52 N. Y. 96, 98, 101, 105-109; 11 Am. Rep. 667; 1 Nat. Bank Cas. 698; *Robinson* v. *Bank*, 81 N. Y. 385, 391; 37 Am. Rep. 508; *Holmes* v. *Bank*, 18 S. C. 31; 44 Am. Rep. 558; *post* ——; *Banking Ass'n* v. *Adams*, 3 Woods, 21, 24, 25; *Houston* v. *Moore*, 5 Wheat. 1. Where Congress means exclusive jurisdiction, it says so; and the citations above, from the Revised Statutes and from the courts, would seem to make it apparent.

Certain it is that the courts named in this amendment of section 5198 have not exclusive jurisdiction of all cases against these banks, for the construction put upon it in a case made on a local action or suit or proceeding in a State court of Louisiana took that case (*Casey* v. *Adams*), and all cases local in character, without their exclusive jurisdiction, and gave concurrent jurisdiction to the State courts having jurisdiction of natural persons in such cases; thus breaking the force of the amendment as it reads, and taking without its operation all local actions, and giving jurisdiction to other courts certainly concurrent, in some cases necessarily exclusive even of the courts named in the amendment.

The case now before us is local, and so local that the only court upon earth that can try it upon the bond sued against this bank and its surety is the court in Georgia, in the county of Fulton. The bank began the litigation by the seizure of Folsom's property, real estate in Atlanta, by attachment under a local statute of this State. It had sued Folsom as surety for Hape on a promissory note, and pending that suit attached the property of Folsom by levy upon several city lots, under sections 3297, 3297a, and following sections of the Code; and in order to attach to procure the writ as a condition precedent thereto by the statute allowing it to attach, it gave the bond sued on, with Campbell Wallace of the city of Atlanta, and State of Georgia, and county of Fulton, as surety on the bond. Code, §§ 3266, 3297a. These sections require the bond to be given before the writ can issue; the language in 3266, which is the general law of attachment, being that "the party seeking the attachment before the same issues, shall also give bond with good security in an amount," etc.; and in 3297a, which is intended for special cases against fraudulent debtors, as in this case, the language is:

"And in all cases where an attachment is brought against the fraudulent debtor, the officer issuing the same shall require bond and security of the applicant for attachment as in other cases of attachment."

For the reasons above stated by the late chief justice, we are of opinion that section 5136 was neither repealed nor modified by section 5198 of the Revised Statutes. There is no conflict between the two sections, but each may have full operation without interfering with the other, except so far as suits for the recovery of excessive interest are concerned. Be this as it may, since the foregoing part of this opinion was agreed upon by the court, and written by the late chief justice, our attention has been called to the proviso contained in section 4 of an act of Congress, approved July 12, 1882, entitled "An act to establish National banking associations, to extend their corporate existence and for other purposes." The proviso designates the courts in which suits by and against such banking associations are cognizable, and regulates the terms upon which the jurisdiction attaches. It is in the following words:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for National banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such National banking associations may be doing business where such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed." Acts 1st Sess. 47th Congress U. S. 1882, p. 163.

This act was of force at the commencement of the present suit, and by its terms made the banking association subject to the jurisdiction of our courts, if a local banking institution of the State and city of New York, where it is located and doing business, would under similar circumstances have been subject to their jurisdiction. It has, as we think, been demonstrated that a non-resident artificial person, seeking the aid of our State tribunals to enforce demands due to such a person, by resorting to the process it did in this case, would voluntarily bring itself within this jurisdiction, and when once it has submitted itself to such jurisdiction, it could not withdraw without complying with the conditions on which alone it was permitted to enter and avail itself of the extraordinary remedies afforded by our laws.

This suit on the attachment bond was brought against the Continental National Bank of New York, located and doing business in that State and city, as principal in said bond, and against Campbell Wallace of Fulton county, Georgia, as security on said bond, and a copy of the petition and process was served on the said security to the bond given by the plaintiff in the attachment, which, according to the provision of our Code, section 3354, was service upon his principal, and entitled the plaintiff in this action to proceed with his suit against both principal and security. Without entering into this obligation and subjecting itself to the remedy thus provided, in case of a breach of the condition of the bond, the defendant in the attachment could never have been called into our courts to answer by this process of attachment the demand of the plaintiff therein. In our opinion, the remedy afforded by the law to the defendant in the attachment upon a breach of the condition of this obligation was as much a part of such bond as though it had been expressly stated therein. It was the indemnity offered him, and which he was bound to accept.

This, it seems to us, is that "due process of law" without which no State can deprive any person of life, liberty or property, and we are unable to perceive how the enactment in question can be considered as denying to any person within its jurisdiction the equal protection of its laws. The statute applies alike to both resident and non-resident citizens, whether they be natural or artificial persons. This law does not, in our opinion, conflict with the fourteenth amendment of the Constitution of the United States. It would be a mere waste of time to cite the numerous authorities upon the question, which may be found scattered through the reports and collected in the various works on constitutional law.

Judgment affirmed.

Libby v. Union National Bank.

Coolbaugh v. Union National Bank.

(99 Ill. 622.)

Real estate — right to — authority of president — when bank required to pay president's note given in his own name.

A National bank may purchase real estate to secure satisfaction of a debt due it even at a price considerably above the debt and from another than the debtor, and may take the title in the name of its president for its use.

Where the president of a bank was long the general agent and manager of the affairs of the bank from its organization with the knowledge and approval of the directors, *held*, that he was warranted in purchasing real estate in satisfaction of suspended paper or a doubtful debt due to the bank in order to prevent loss.

Land conveyed in trust to secure a note due a bank having been sold without redemption under a prior incumbrance, and Coolbaugh, the president of the bank, having bought it, taking a deed in his own name, for which he turned over the note due the bank and gave his individual note and deed of trust for the balance of the price, and the court, on bill to foreclose the trust deed and cross-bill by the heirs of the president to require the bank to pay the note, having found that the land was bought by the president for the bank, as its agent, to secure a part of the debt, *held*, that the bank should pay the amount due and thereby release the estate of the maker of the note.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of

Cook county; Hon. S. M. MOORE, Judge, presiding. The head-note and opinion show the facts.

Wm. C. Gourly, for appellant Libby.

J. R. Doolittle, for appellants, Coolbaugh's administrators.

McCoy & Pratt, for appellees.

DICKEY, J. Several questions are presented for our consideration by this record. The theory of appellants is, that the bank having a claim against Adam Smith and others of over $30,000, inadequately secured, accepted the deed from Libby to Coolbaugh in payment of that demand, and to accomplish that end agreed to pay, in addition to the amount of this demand, the sum of $22,000 in money, to be paid in three years with interest; that the title to the land was taken to Coolbaugh to hold and sell for the bank, and hence the debt to Libby is really the debt of the bank.

The first question naturally arising is, whether the National bank has power, under its charter, to buy and hold real estate for such a purpose. If the nature of the transaction be in truth such as is claimed by appellants, there can be but little question of the power of the bank in this regard. It is provided by the act of Congress that a National banking association may purchase, hold and convey real estate for certain enumerated purposes and "for no others." Among the purposes enumerated is included such real estate "as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings." If therefore the real purpose of this conveyance was to secure the satisfaction of the indebtedness evidenced by the Adam Smith notes, it was entirely competent for the bank to make the purchase in question.

This question was discussed in *Mapes* v. *Scott*, 88 Ill. 355, and by the views there expressed the power of the bank to purchase and hold real estate in the manner claimed in this case seems to be beyond question. If in this case the subject of this purchase had been laid before the directors of the bank and Mr. Coolbaugh had been directed to buy off Libby's prior and superior claim at $22,000, and by an arrangement with Smith and Libby to sur-

render to Libby for Smith the $30,000 claim of the bank against Smith for a clear title to this land, to be conveyed to Coolbaugh for the benefit of the bank — and all this for the purpose of securing in this way the payment of this $30,000 claim — we imagine none could be found to deny the capacity of the bank to thus purchase real estate for the satisfaction of a debt contracted in the ordinary course of business.

The next question in order seems to be, whether Mr. Coolbaugh had authority to act for the bank in this regard so as to make his acts the acts of the bank. It would seem there can be but little doubt upon this question. Coolbaugh was not only president of the bank, clothed with official authority as such, but he was the general agent and manager of the affairs of the bank and had been from its very organization. This the proof shows abundantly. His powers, as shown by a long course of action known to and acquiesced in and evidently approved by the directors, fully warranted him in accepting in satisfaction of suspended paper any valuable thing which, in his judgment, it seemed wise to accept. It is strenuously insisted, because there is no special grant of such power to him as president found in the by-laws, that he had in fact no such power. There are many things done daily in every bank which are in fact and in law the acts of the bank, and of which no mention is made in the by-laws. Some officer or agent or employee of the bank receives, daily, large sums of money on deposit, for which the bank at once becomes liable, and yet no mention is made in the by-laws of any power in any officer or agent to receive such deposits. Had Coolbaugh accepted from Libby a draft on New York, payable to the bank, for $55,000, in satisfaction of these Adam Smith notes (or Swansea notes, as they are sometimes called), or in purchase of them, and had he paid Libby for the same, in addition to the notes in question, $22,000 from the cash of the bank, or had he given instead to Libby the promissory note of the bank for that sum, there could have been no question as to his acts in that regard being the acts of the bank, and by which the bank would have been bound. The whole course of business of this bank, as managed by Mr. Coolbaugh for years, shown by the proofs, could leave no doubt about this. It is not perceived that the

fact that real estate was accepted, and not a draft, can make any difference in the result.

We are therefore brought at last to the question whether the allegations of appellants in this regard are true, in point of fact. This the appellee most strenuously denies. No question is made that the taking of the original notes, in September and October, 1873, was done by the bank; nor is it denied that the bank, through Coolbaugh, about December 4, 1873, extended the time of payment upon this indebtedness for six months, retaining the original notes, and taking in addition four other notes, and as security to them the pledge of the shares in the Swansea company and the deed of trust to Merrill upon the land in question. That transaction of December is conceded to be business transacted by the bank; nor is it contended that the co-operation with Ames and others in the injunction suit against Libby, in January, 1875, for the purpose of relieving the claim of the bank upon this land from Libby's prior lien, was not the act of the bank. All this was conducted and controlled by Coolbaugh, in behalf of the bank.

The contention relates to facts occurring after the injunction suit was ended. Counsel for the bank state their theory of the case as follows: "After the sale under the Libby trust deed, Adam Smith induced Coolbaugh to purchase the land in question for the benefit of Smith, and as an inducement to this end, Smith agreed that he would pay accruing interest upon the purchase-money note; that he would sell the land before the principal should mature, and out of the proceeds of such sale Mr. Coolbaugh should retain all his disbursements, and if any thing remained, it should be applied in liquidation of the debt of Adam Smith to the bank."

This statement we regard as very near the truth, but not the whole truth.

Coolbaugh had the promise of Libby, made before the sale to Libby, that the bank might have this part of the land at $1,000 an acre. Had he consummated that purchase, the bank would have held the title, subject to redemption by Smith, on payment of the money paid to Libby and the amount of the notes given to Merrill. To cut off this equity of redemption by Adam Smith

would have required a foreclosure in court, or another sale under the Merrill trust deed. The land was considered worth from $2,000 to $3,000 an acre, that is, from $44,000 to $66,000. Coolbaugh, in his conversation with Merrill, estimated it at $44,000. But the market was dull, and to realize cash at a fair price seemed to require that the land should be held for a while. We agree with counsel for the bank in saying: "Adam Smith induced Coolbaugh to change his original arrangement with Libby, and instead of simply buying in for the bank the outstanding title of Libby for $22,000," induced Coolbaugh to purchase "the land," the absolute title to the land, by adding the notes of Smith (called the Swansea notes), and by substituting, instead of $22,000 in cash, a note for the amount at three years, at ten per cent interest. But we would add, that he induced him to purchase for the bank. We agree with counsel that this arrangement was intended to be "for the benefit of Smith," but we think it was intended also to be for the benefit of the bank. Smith was to be benefited by getting up the notes on which he was liable to the amount of about $33,000, which was an object no doubt desirable to him. Coolbaugh regarded the personal liability of the makers of the paper and stock of the Swansea company as of no value to the bank, but thought that Smith was an expert and skillful real estate operator, and was willing in behalf of the bank to surrender this paper (which he considered of no value) and take the hazard of Smith's being able to pay the accruing interest on the note to Libby, and finally to discharge the principal by sales of the property in parcels, and in the end to refund to the bank at least two-thirds of what the bank had lost by the depreciation of the Swansea paper; and we agree with counsel in saying that "as an inducement to this end, Smith agreed that he would pay accruing interest upon the purchase-money note" to Libby, and "that he would sell the land before the principal should mature, and out of the proceeds of such sales Mr. Coolbaugh should retain all his disbursements;" but we would add to the statement that this meant "all of his disbursements" for the bank; and we agree with counsel in saying that what remained of these proceeds after paying the Libby note and the incidental disbursements, was to "be applied in liquidation of" the amount of "the debt

of Adam Smith to the bank," which by the arrangement was turned over to Libby "for the benefit of Smith," and thus the bank, by this purchase, was to obtain in part satisfaction of a debt originally contracted in the ordinary course of business.

The question in dispute is thus narrowed to the inquiry whether Coolbaugh's acts in this purchase from Libby constituted a purchase by Coolbaugh personally, for his own profit or with a view of aiding Smith as a friend, or whether they constituted a purchase by the bank, as a means of getting part satisfaction of a debt which had become desperate. What is the evidence bearing on this question?

The contention relates to facts which occurred after the termination of the injunction suit.

Libby testifies that after that, and before the sale at which he acquired the title to the entire eighty acres, in a conversation with Coolbaugh, he promised that if he should get the title at that sale the bank should have the Adam Smith land at $1,000 an acre, or at what was the cost of the same to Libby, if it did not sell for more than Libby's claim, and that after the sale he learned from Adam Smith that Coolbaugh would be willing, on behalf of the bank, to give the Adam Smith notes, or the Swansea notes as they were sometimes called, and $22,000, for a deed to the land, and that he went to the bank and there consummated the trade upon the terms mentioned. He says in his testimony, that Coolbaugh in making the trade said he was making it for the bank, and so he accepted and received the Swansea notes, and Coolbaugh's note secured by the trust deed upon the land conveyed. He further testifies that after he had received all these securities at the request of Coolbaugh, and with the consent of Adam Smith, who had an interest in the purchase of the notes, he left the Swansea notes in the custody of the bank, Coolbaugh saying: "They are subject to your order, Mr. Libby; you can have them any time you want them." He further says the original arrangement was that the bank was to have this land at $1,000 per acre, and that the arrangement to put in the Swansea notes was an arrangement brought about by a bargain made between Smith and Coolbaugh. These Adam Smith notes, or Swansea notes, were not considered of any value in themselves by Libby at that time.

Adam Smith testifies that after the sale to Libby the witness saw Coolbaugh, and suggested that in order to secure the bank he had better buy this twenty-acre tract from Libby, and turn in the notes of the Swansea company, amounting to $30,000, and he would try to sell it for him and bring him out; and that he, the witness, brought Mr. Libby to the bank, and he and Coolbaugh made a trade, whereby Coolbaugh "was to buy for the bank twenty acres, and turn in these Swansea notes as first payment, and pay $22,000 on time, to be secured on the twenty acres as a balance of purchase-money." He swears "Coolbaugh said he was doing this to secure the bank," and that "the reason he did not have the land deeded directly to the bank was, that he did not want it to appear that the bank was carrying so much real estate." The witness further testified that after the trade was closed Coolbaugh requested Libby, in the presence of the witness, that he would leave those Swansea notes in the bank for a time; that they should lie there as his property, and that he said he would give Libby any kind of a receipt he wanted.

Merrill testifies Coolbaugh consulted the witness about taking this land of Libby, and said: "If there is any security in the property, I want to get additional security," and said he thought "it would be worth to the bank" possibly $1,000 an acre. The witness adds it was generally understood the equity of redemption over what was going to Libby was $1,000 an acre, or more, and Coolbaugh said that in this transaction he wanted to get more security, for the parties on the notes had become worthless. More security for what? This declaration could refer to nothing except further security for the claim of the bank growing out of these transactions with Adam Smith.

The testimony of Donnersberger shows that about that time Coolbaugh was in conference with some gentlemen, whom the witness did not know, about this property, and in connection with this $30,000 claim of the bank, with a view of securing or saving in part this $33,000 claim.

This testimony seems to be abundant to show that this transaction with Libby was a transaction for the bank, although transacted in form in the name of Coolbaugh. Considering all the circumstances developed by the proofs, we have no doubt what-

ever that this is the real truth. No witness pretends to contradict the direct and explicit testimony of Adam Smith and of Washington Libby, supported and corroborated as it is by the testimony of Merrill and Donnersberger.

It is contended that certain circumstances developed in the testimony tend strongly to show that this purchase from Libby was made by Coolbaugh either as a personal speculation, or in trust for Adam Smith. When carefully analyzed and compared, we find nothing in them incompatible with the idea that the purchase was in substance and in fact a purchase by the bank — so intended by Coolbaugh, and so understood by Libby, and also by Adam Smith.

Let us consider some of these facts on which counsel for the bank seem chiefly to rely.

It is said "no officer, director or stockholder of the bank ever heard of this contract;" that although Libby may have promised the bank the privilege of redeeming at $1,000 an acre, still this is not a redemption, but on its face a purchase out and out, and entirely in the name of Coolbaugh, without mention of the bank in any of the papers; that no memorandum or entry of any kind relating to the transaction was made in any of the books of the bank; that for two years and a half Coolbaugh personally paid the taxes on this land and the interest on the note given to Libby, except the first installment of interest, and that was paid by Adam Smith; that after this purchase from Libby, Coolbaugh, in his own name, joined Libby in vacating the plat before that time made of this eighty-acre tract, and in making a re-subdivision of the land, under the name of "Coolbaugh and Libby's Subdivision;" that the Adam Smith or Swansea notes were retained in the bank, and this for no possible end, if appellants' theory be true; that if this property had been taken in payment of the Adam Smith and Swansea notes, they should have been canceled; that the note given by Coolbaugh to Libby was made payable at the Traders' National Bank, and not at the Union National, for the purpose of concealment, as is suggested, from the officers and employees of the Union National; that this note was put at three years, at ten per cent, when the bank had plenty and a surplus of money on hand, and was paying no interest on money, save to

country banks, and that not over three per cent; that this land was by direction of Coolbaugh omitted from the list of the lands of the bank; that no part of Coolbaugh's disbursements for interest or taxes were ever charged by him against the bank, or collected from it.

To our minds all these circumstances are in complete accord with our view of the true character of this transaction.

It is well known, as a part of the history of that time, that by a revulsion in monetary affairs, which occurred in the fall of the year 1873, most of the banks in this country found it necessary, in their efforts to avoid loss, to resort to the real estate of their debtors for security. It is equally well known that it was regarded as injurious to the credit of any bank to have it known that it was carrying any considerable amount of real estate, and that it was a common device among bankers, when it was necessary to resort to real estate for security, to have such real estate carried upon the records not in the name of the bank, but in the name of some person in whom confidence was placed. It is plain that considerations of this kind had an influence on this transaction long before the sale of this land by Libby, for we find that in December, 1873, when Adam Smith induced Mr. Coolbaugh, in behalf of the bank, to extend the time of payment of this $30,000 debt, the notes for that purpose were not made payable to the bank, but were made payable to Merrill.

There is then no reason to discredit the testimony of Adam Smith when he swears that Mr. Coolbaugh assigned as "the reason he did not have the land deeded directly to the bank, that he did not want it to appear that the bank was carrying so much real estate." To avoid this the land was deeded to Coolbaugh instead of to the bank, and the note for the money to be paid to Libby was given by Coolbaugh instead of by the bank; and for the same reason no memorandum of the transaction was made in the books of the bank; and for the same reason Libby was induced, with the consent of Smith, to leave in the custody of the bank the Swansea paper, or Adam Smith notes, that they might remain on the books of the bank as bills receivable, and that the stock certificates and Merrill deed of trust might remain "in the safe of the bank, where they were kept with other collaterals of the

bank ordinarily," as Hippell swears they did; and for the same reason Coolbaugh paid the taxes, and also the interest on Libby's note, after Adam Smith failed to do so, and this without any charge for the same being entered on the books of the bank; and for the same reason, when it was thought best to vacate the old plat and plat the ground anew, Coolbaugh, and not the bank, joined with Libby in doing this, the fee of this twenty-two acres being vested at law in him; and for the same reason this tract was omitted from the list kept of the lands of the bank. The note to Libby was no doubt given at three years, and at ten per cent interest, and made payable at the Traders' Bank, for the convenience of Smith, who had, as counsel concede, agreed to keep the interest paid, and to give time to realize the amount from sales of lots, without drawing upon the cash of the bank, for such a bank would at once make it apparent on the books of the bank that the bank was carrying this amount of real estate, and this Coolbaugh wished to avoid.

Not only are these circumstances all in harmony with our theory as to the real truth of this transaction, but there are some circumstances which, if not wholly incompatible with any other theory, at least strongly corroborate our view.

The fact that Smith at first paid the interest on the Libby note shows that he was in some way interested in the purchase, and the fact that the deed of Libby for this land recites a consideration of $55,000, which agrees with the amount of $22,000 note given Libby, added to the amount of $33,000 (representing the original $30,000 debt of Smith and others, with interest and expenses incurred), strongly supports the testimony of Smith and Libby that this claim of the bank was a part of the consideration or price of this land. If this be so, and the purchase was not made for the bank, why was not the amount of this claim charged on the books of the bank against somebody? If Coolbaugh bought for himself, why was it not charged to him? There was no objection to its appearing on the bank books that Coolbaugh had personally bought that claim from the bank and used it in a trade for his own use, had that been the truth. The same suggestion is equally pertinent as against the theory of his having made the purchase as a friend of Smith, and as a speculation for Smith.

It is somewhat significant that this deed of Libby to Coolbaugh, with a professional opinion as to the title, was placed by Coolbaugh in a box of the bank in which the title papers of lands of the bank were usually kept, and were found there after his death, in an envelope indorsed in the handwriting of Coolbaugh.

"Papers relating to 23 acres of land purchased of Washington Libby, acct. Adam Smith & Co."

Coolbaugh personally had no account or dealings with Adam Smith & Co., on account of which it could be said this purchase was made. This clearly indicates that the object of the purchase had relation to some transactions with Adam Smith & Co. The bank, and the bank alone, had had transactions of this character. Another fact in harmony with all the circumstances is, that in making this purchase, Coolbaugh sought and obtained the opinion of a lawyer as to the title, and for this opinion the charge was made by the lawyer against the bank, and with other charges against the bank was rendered in an account and paid by the bank, although Coolbaugh had a personal account with the same parties.

All truths are consistent with each other. In an examination of all the proven facts in this case, they can all be reconciled with each other on the theory that this purchase from Libby was by the bank and for the bank, and they cannot be reconciled upon any other hypothesis which has been suggested or which has occurred to us. It is not denied that Coolbaugh bought from Libby, either for the bank or for himself, or for the benefit of Smith. No motive can be found to induce such a purchase for himself as a speculation, at the price of $55,000, when his estimate of the value was $44,000. He is not shown to have had any motive to attempt to serve Smith as a friend in a transaction where the bank was interested against Smith, and the duty of protecting the interests of the bank rested upon him while he owed no duty to Smith; nor can we conceive how Smith could expect to be benefited by a purchase by him at $55,000 of property worth only $44,000. There is a motive, and a laudable one, shown for the purchase by the bank, as we have already shown. It seems to us plain that the bank, in truth, was the purchaser, and as such should pay the unpaid part of the purchase-money, and that the

estate of Coolbaugh should be held liable only as a security for the bank.

The judgment of the Appellate Court is therefore reversed, and the cause remanded to that court, with directions to that court to reverse the decree of the Superior Court of Cook county, and remand the cause to that court for further proceedings in accord with the views expressed in this opinion.

Judgment reversed.

WALKER and SCHOLFIELD, JJ., dissent

LAING v. BURLEY.

(101 Ill. 501.)

Shareholder — liability — purchaser from former owner — transfer not made on books — "shareholder" liable for debts.

Where a National bank issues certificates of its shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-law in regard to a transfer on its books, so far as creditors of the bank are concerned a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking Law.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county, Hon. ELLIOTT ANTHONY, Judge, presiding.

Wallace & Mason, for appellant.

Monroe & Ball, for appellee.

SCOTT, J. Claimant is the receiver of the Cook County National Bank, and as such filed a claim in the Probate Court of Cook county against the estate of Clara Irene Day Laing, deceased.

Section 5151, title 62, chapter 1, Revised Statutes of the United States, 1874, declares:

"The shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

It is under this section of the National Banking Act the liability is said to arise for the par value of the stock alleged to have been held and owned by the intestate in the "Cook County National Bank" at the time of her death. No question is made as to the liability of the estate if it shall be ascertained the intestate was a "shareholder" in the bank, in the sense that term is used in the section of the Banking Act cited.

Originally Isaac C. Day was the owner of one hundred shares of the stock of the banking association, of the par value of $10,000, evidenced by two certificates issued to him. Subsequently these certificates were returned to the bank, with a blank indorsement thereon, by persons representing themselves to be the heirs of the estate of Isaac C. Day, deceased, among whom was the intestate, Clara Irene Day, and to whom was issued a new certificate for a part of the same stock that had been owned by Isaac C. Day, viz.: for thirty-three shares of the par value of $100 each. Other certificates were issued to the other persons representing themselves to be heirs, to the full amount of the remainder of the stock that had been owned by Isaac C. Day. The ledger and the stubs of the stock certificate-book kept by the bank showed the issuing of the several certificates, the number of shares of stock embraced in each, the date and to whom issued.

There is and can be no question made the intestate held a certificate for thirty-three shares of stock in the banking association, for the par value of $100 each, at the time of her death. On notice to the administrator, he produced on the trial a certificate for that amount of shares of stock, that had been issued to her. The fact such certificate was held by her would imply an acceptance, and coming as it did from her administrator, it is not unreasonable to believe it had previously been in her possession. Holding the stock of the banking association in her own name, as the intestate did, no reason is perceived why she was not a "shareholder," within the meaning of the statute, and subject to the liabilities imposed upon "shareholders" by section 5151 of

the National Banking Act. The only argument made against such liability is, the stock formerly owned and held by Isaac C. Day was never transferred to the intestate "on the books of the association," as provided stock may be transferred in section 5139 of the same title and chapter of the Banking Act, cited *supra*, and it is said until such transfer was so made on the "books of the association," the intestate did not "succeed to all the rights and liabilities of the prior holder of such shares." The Banking Law will not bear this construction. It may be the association would not be bound to admit a purchaser of shares of stock "to all the rights and liabilities of the prior holder of such shares," unless the transfer to him was made on the books of the association in such manner as may have been prescribed in the by-laws or articles of association. But however that may be, when the association does issue certificates of shares of stock to a subsequent purchaser, in lieu of the certificate of the prior owner, without observing its by-laws in regard to transferring stock on its books, certainly so far as creditors of the association are concerned, a party holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking Law. It will be noted the liability is imposed upon the "shareholder," and it is a matter of no consequence such shares may not have been transferred to such shareholder on the books of the association in exact conformity with its by-laws. It is sufficient if the ownership of the shares is in fact in the person holding the certificate, to constitute him a "shareholder" in the association, and subject him to the liabilities imposed by the Banking Law, under which such association may have been organized. A case in this court analogous in principle with the one at bar is *Wheelock* v. *Kost*, 77 Ill. 296.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Hoke v. People.

(122 Ill. 511.)

Jurisdiction — State courts in forgery.

Defendant, a book-keeper in a National bank, without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. *Held*, on an indictment for forgery, that the crime was within the jurisdiction of the State courts.

ERROR to Circuit Court, Peoria county.

Swett, Grosscup & Swett, for plaintiff in error.

George Hunt, Attorney-General, *J. M. Niehaus*, State's Attorney, and *N. E. Worthington*, for the people.

Sheldon, C. J. The plaintiff in error, John Finley Hoke, was convicted of the crime of forging a draft for $1,000, purporting to be drawn by the Merchants' National Bank of Peoria, upon the Merchants' Exchange National Bank of New York, of the date of September 1, 1885, and was sentenced to imprisonment in the penitentiary for the term of five years. It appears from the evidence that Hoke was a book-keeper in the Merchants' National Bank of Peoria, a corporation organized under the National Banking Act, and that he, without authority, filled up in his handwriting the draft in question, which had been signed in blank by the assistant cashier, and delivered the same to one G. J. Brown, in payment of margins upon certain deals of Hoke on the board of trade, and that no money was paid therefor by Brown to Hoke or the bank. Hoke at the time made false and untrue entries in the books of the bank in order to conceal the fact of the unlawful issuance of the draft. The draft was afterward paid by the Merchants' National Bank in the ordinary course of business. Plaintiff in error's counsel, in the opening of their written argument, say: "We desire expressly to restrict the review of this case to but one question, viz.: Did the court have jurisdiction, and did it err in refusing appellant's instructions on that point? We contend that

the offense charged in the proof against appellant was cognizable in the Federal courts, and was therefore excluded from the jurisdiction of the State court."

Section 5209 of the Revised Statutes of the United States is as follows:

"Every president, director, cashier, teller, clerk or agent of any association (referring to National banks), who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association; or who without authority from the directors, issues or puts in circulation any of the notes of the association; or who without such authority issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section — shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

It is urged that the offense established by the proof upon the trial of this case is an offense under this section of the statutes of the United States, and that being an offense thereunder, it is punishable in the United States courts alone. The act of Congress, March 3, 1875, § 1 (Supp. R. S.), provides:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds," etc., " * * * arising under the Constitution or laws of the United States, or treaties made," etc.; " * * * and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law."

Chancellor Kent, in respect of the concurrent power of the States in matters of judicial cognizance, observes: "In the Judicial Act of 1789 the exclusive and concurrent jurisdiction conferred upon the courts by that act were clearly distinguished and marked. The act shows, that in the opinion of Congress, a grant of jurisdiction generally was not of itself sufficient to vest an exclusive jurisdiction. The Judicial Act grants exclusive jurisdiction to the Circuit Court of all crimes and offenses cognizable under the authority of the United States, except where the laws

of the United States should otherwise provide;" and this accounts for the proviso in the act of 24th of February, 1807, chapter 20, and in the act of 10th of April, 1816, chapter 44, concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offenses made punishable by that act. There is a similar proviso in the act of 31st of April, 1806, chapter 49, concerning the counterfeiters of the current coin of the United States. Without the provisos the State courts could not have exercised concurrent jurisdiction over those offenses consistently with the Judicial Act of 1789. 1 Kent Com. (12th ed.) 373.

And yet in *Prigg* v. *Pennsylvania*, 13 Pet. 627, in asserting the exclusive power of Congress over the subject of fugitive slaves, Justice STORY observes: "To guard however against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

And in *City of New York* v. *Miln*, 11 Pet. 138, it was said "that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; * * * that all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently in relation to these the authority of the State is complete, unqualified and exclusive."

In *Eells* v. *People*, 4 Scam. 498, Eells had been indicted under a statute of this State making it an offense to harbor and secrete any negro slave, or to hinder or prevent the lawful owner of such slave from retaking him, and the point was made in the defense, but not sustained, that the offense described in the indictment was precisely such an offense as was indictable under the Fugitive Slave Law of Congress of 1793. The court, by SHIELDS, J., there said:

"This (the State) law prescribes a rule of conduct for our own citizens. If the State can do this, and I hardly think the power questionable, it can punish those who violate the rule. If a State has power to regulate its own affairs, it has the power to define offenses and punish offenders." And again: "It is also said that this law may punish a man twice for the same offense. There is no force whatever in this objection. The offenses are separate and distinct; violations of distinct and different laws and the punishments inflicted by different sovereignties."

The conviction in the case was affirmed by the Supreme Court of the United States in *Moore* v. *People*, 14 How. 13, Moore being the executor of Eells. It was there said by the court: "But admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. * * * The same act may be an offense or transgression of the laws of both (State and United States)," for which, as afterward said, the offender is justly punishable. And it was there further said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States or restrained by the Constitution of the United States."

The indictment in this case is for the crime of forgery. In the offense described in section 5209 above of the United States law, which is claimed as being the same as that shown by the proof here, the offender is an officer or clerk of a National bank, who without authority from the directors draws an order or bill of exchange with intent to injure or defraud, etc. The offenses do not appear to be the same. Under this indictment for forgery there could not, we apprehend, be a conviction for the offense described in section 5209. Nor would an indictment charging merely the offense described in that section sustain a conviction for forgery. The objects of the United States law and the State law appear to be different. The purpose of the former seems to be for the protection of National banks; to punish breaches of trust on the part of those holding fiduciary relations toward such banks; to punish

what is of the nature of a private crime. The State law is for the protection of the public against the public mischief to the people of the State from the perpetration of forgeries. The United States statutes is not leveled against the crime of forgery, but against a breach of trust. The offense is called but a misdemeanor. There is no apt language in section 5209 to describe forgery. Whenever Congress has legislated with respect to that offense it has used the language which is appropriate for its description. Thus under title 70, U. S. R. S., § 5414, provides:

"Every person who with intent to defraud, falsely makes, forges, counterfeits or alters any obligation, etc., of the United States shall be punished by a fine of not more than $5,000, and by imprisonment at hard labor not more than fifteen years."

§ 5415. "Every person who falsely makes, forges or counterfeits, etc., any of the circulating notes of any banking association now or hereafter authorized and acting under the laws of the United States, shall be imprisoned at hard labor not less than five nor more than fifteen years, and fined not more than $1,000."

And so of other sections providing for the punishment of forgery, where the United States may be injured, the description of the offense is in the like apt language. The punishment there denounced against the crime of forgery is greater than that prescribed in section 5209 for the breach of trust there made punishable, exceeding it by five years in extent of imprisonment. And section 5328, under this same title (70), declares:

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

There is thus manifestation in the legislation of Congress that section 5209 is not directed against the crime of forgery; that the offense provided against in that section is of less degree than that of forgery; and that it was not the intent to suspend in any respect the jurisdiction of the State courts over the crime of forgery under State laws, inasmuch as the United States law providing for the punishment of forgery declares that nothing therein shall be held to take away or impair the jurisdiction of the State courts under State laws. The State law is in no way repugnant to section 5209, and is not at all in the way of supplement to the legislation therein. It is but a statute for the punishment of the common-law crime of forgery. Because it happens to appear in the proof

in this case that the wrong-doer was the clerk of a National bank, and that the draft was drawn without authority from the directors of the bank, thus presenting the peculiar elements which constitute the offense in said section 5209, and because, may be, the proof shows nothing more than what amounts to the offense described in that section, we do not think that thereby the jurisdiction of the State court over the crime of forgery should be taken to be suspended. The cases cited in behalf of the plaintiff in error are mostly cases relating particularly to the execution of some Federal statute, or to some act done within some Federal tribunal. The distinction is taken in *State* v. *Pike*, 15 N. H. 83, between cases where the alleged criminal act is done in the course of the execution of the laws of the United States, and where not so done, and favoring the idea that the exclusive jurisdiction of the Federal courts may exist in the former class of cases, and not in the latter. The same distinction was recognized in *People* v. *Kelly*, 38 Cal. 145; 99 Am. Dec. 360, as one properly taken. The offense here charged was not committed in the course of the administration of any law of the United States.

In *Com.* v. *Luberg*, 94 Penn. St. 85; 2 Nat. Bank Cas. 408, a conviction in the State court of the offense of making false entries in the books of a National bank by the receiving teller of the bank was sustained.

But in *Com.* v. *Felton*, 101 Mass. 204; 1 Nat. Bank Cas. 573, it was held that the offense of the embezzlement of the funds of a National bank by its cashier was exclusively cognizable by the courts of the United States, and that it was taken out of the jurisdiction of the State court by the acts of Congress.

While the case does not seem to be entirely clear upon the authorities, we are disposed to hold that the crime charged in the indictment, or that established by the proof, is not excluded from the jurisdiction of the State court.

The judgment will be affirmed.

Ellis v. First National Bank of Olney.

(11 Bradw. 275.)

Usury — penalty — set-off — limitation.

Where a National bank has actually taken usurious interest, the party paying it may recover double the amount in an action therefor, but cannot set off or counter-claim it in an action to recover the principal; and the action for such penalty must be brought within two years.

APPEAL from Circuit Court of White county.

P. A. Pearce & A. Bleakley, for appellants.

John M. Crebs, for appellee.

Baker, P. J. This was *assumpsit* by the First National Bank of Olney, defendant in error, against plaintiffs in error, on three promissory notes for $400 each, dated respectively November 19, December 2 and December 7, 1881, and each due ninety days after its date. Plaintiffs in error filed three pleas, the first of which was the general issue. The second plea was a plea of usury, and purported to answer as to $1,200 of the damages claimed. The plea alleged the borrowing of $600, on the 21st of January, 1873, and the execution of a note for that sum due in ninety days, and that out of said sum of $600, defendant in error usuriously and unlawfully retained twelve per cent as advanced interest on said note, and that said note was renewed at the end of every ninety days from that date until October 27, 1877, and that upon each of such renewals, defendant in error exacted and received twelve per centum on said $600, and that the same was paid, etc. The plea further averred the borrowing, on the 19th of January, 1874, of an additional sum of $500, for which a ninety-day note was given, twelve per cent interest in advance exacted, and that said $500 note was renewed at the end of each ninety days until October 27, 1877, and that upon each renewal defendant in error exacted and was paid twelve per cent interest on said sum of $500. That in October, 1877, plaintiffs

in error, in consideration of the $600 note and the note for $500, and an additional indebtedness of $100, executed to defendant in error their three several notes for $400 each, payable in ninety days, upon each of which notes ten per cent of said amounts was exacted and received as advanced interest; and that each of said notes was renewed at the end of each ninety days thereafter, and that upon each renewal, interest at the rate of ten per cent per annum was exacted and received.

To this second plea three replications were filed, upon the first of which issue was joined, and a demurrer was interposed to the second and third replications. These two latter replications were as follows: "And for a further replication in this behalf plaintiff says *precludi non*, because it says that the plaintiff did not within two years next before the commencement of this suit retain or receive any usurious interest, as alleged by the defendants, and this it is ready to verify." "And for a further replication, plaintiff says *precludi non*, because it says that it is a corporation organized and doing business under the laws of the United States authorizing and regulating National banks, and that its rights and liabilities are regulated by said act, and that it has not charged, retained or received any usury of defendants within two years next prior to the commencement of this suit. And this the plaintiff is ready to verify, wherefore it prays judgment," etc. The demurrer to these two replications was overruled by the court. The National Bank Act of 1864 regulates the rate of interest that may be taken, received, reserved or charged by such banks. Section 30 of said act has since, in the Revised Statutes of the United States, been divided into two sections, and the latter of said sections (U. S. R. S., 1878, § 5198) reads as follows:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred."

The construction to be given to this section of the act of Congress is not an open question. Its scope and purport have been

authoritatively announced by the Supreme Court of the United States. In *National Bank* v. *Dearing*, 91 U. S. 29; 1 Nat. Bank Cas. 117, it was held this section provided for the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid. In the subsequent case of *Burnet* v. *National Bank*, 98 U. S. 555, the court gives the analysis of the statute: "Two categories are thus defined, and the consequences denounced. 1. Where illegal interest has been knowingly stipulated for, but not paid, then only the sum lent, without interest, can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt, or suit in the nature of such action against the offending banks, brought by the persons paying the same, or their legal representatives." The court referring to the case before them, further says: "In the first defense the payment of the usurious interest is distinctly averred, and it is sought to apply it, by way of offset or payment, to the bill of exchange in suit. In our analysis of the statute we have seen that this could not be done. Nothing more need be said upon the subject. In the third defense, as set forth, the like payment is alleged, and there is a claim to recover double the amount paid by way of counter-claim in the pending suit on the bill. This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties." In the case before us, the two replications were clearly bad. They each assumed to answer the whole of the second plea, and each averred there was no usurious interest retained or received within two years next before suit brought. It is very evident the two years' limitation has no application where the illegal interest has simply been retained or reserved. In such case the interest stipulated for would be forfeited, and the plaintiff could only recover the principal of the notes sued on, less the amount of the interest unlawfully reserved. The second plea, to which these replications

were filed, so far as it assumed to set up the taking and receiving of usurious and unlawful interest as payment *pro tanto* of the promissory notes in suit, was also bad, and presented an immaterial issue. The first replication upon which issue was joined, traversed the receiving of usurious interest; and trial was had and judgment rendered upon this immaterial issue, which did not determine the substantial rights of the parties litigant under the statute of the United States; and that by statute these contracts are governed. It follows from what we have already said, there was no error in sustaining a demurrer to the third plea filed by the plaintiffs in error; that plea sought to set off against the causes of action disclosed by the declaration, illegal interest "knowingly collected of and from" plaintiffs in error by defendant in error. It may be well to state by way of explanation, that much is said in this opinion which would not be properly said, if the rights of the parties in this controversy were controlled by the State statute instead of the Federal statute. See *National Bank* v. *Dearing*, *supra*. There is in the record before us, that which purports to be a certificate of the evidence heard on the trial of the case in the court below; but as it is neither signed nor sealed by the judge who presided at the trial, it cannot properly be regarded as a part of the record in the case. The judgment of the Circuit Court, which was in favor of defendant in error for $1,133.17 and costs, is reversed and the cause remanded. Under the pleadings in the case, as they stand, justice cannot be enforced, and the real and substantial rights of the parties determined. A repleader will be awarded, and leave given plaintiffs in error to withdraw their second plea and file such additional plea or pleas as they may deem necessary.

Reversed and remanded.

First National Bank of Greenville v. Sherburne.

(14 Bradw. 568.)

Notes — purchase — discount — notice to bank — knowledge of president.

A National bank may purchase negotiable paper.

The private knowledge of the president of a bank of the failure of the consideration of a note purchased by it is not attributable to the bank.

APPEAL from Circuit Court of Bond county.

Van Hoorebeke & Ford and *W. A. Northcott*, for appellant.

W. H. Dawdy and *S. A. Phelps*, for appellee.

Baker, J. The power given to National banks as respects the matters here in issue is, "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt." U. S. R. S., § 5136. It is urged the transaction involved in this case was a purchase by appellant of the note, that a National bank has no power to make such purchase, and that the bank took no title thereto and cannot recover thereon. The cases of *Lazear* v. *Nat. Union Bank of Maryland*, 52 Md. 78; 36 Am. Rep. 355; 2 Nat. Bank Cas. 261; *F. & M. Bank* v. *Baldwin*, 23 Minn. 198; 23 Am. Rep. 683, and *First Nat. Bank* v. *Pierson*, 24 Minn. 140; 31 Am. Rep. 342; *post* , are cited as authorities in that behalf. As we understand the facts of the case bearing upon the question under consideration, the note was executed by appellee, and payable on the 1st of September, 1882, to the order of one E. B. Wise, and was by said Wise on the 29th of June, 1882, and before maturity, indorsed in blank and delivered for value through its cashier to the appellant bank. No point was made in the court below as to the title of appellant, and the evidence does not disclose what discount was made upon the note.

The argument made here is based upon the statement of the cashier that he purchased the note from Wise, and that it was bought in the usual course of business, as he bought other notes.

It may be questionable whether the words used in the statute "by negotiating" are broad enough to include that which was here done by the bank; and yet according to the lexicographers, the word "negotiate" means not only "to transfer," "to sell," "to pass," but "to procure by mutual intercourse and agreement with another." It appears that the note was taken by a National bank and "in the usual course of business." Admitting the bank had no power to become vested with the legal title to the note otherwise than by "discounting" it, the fair and reasonable presumption, from the fact it was taken in the usual course of business of a National bank, would be that it was discounted. The fact the cashier in stating the transaction uses the words "purchased" and "bought," we do not deem of much importauce. In *Atlantic State Bank* v. *Savery*, 82 N. Y. 291, a similar statute was under consideration, and the word "bought" was used by the witness and a written memorandum of the transfer was made and delivered at the time, in which the word "sold" was used, and yet it was held it was a discount and the title to the note was valid. In the present case the paper was procured from Wise, who was both payee and indorser, and was transferred by an indorsement imposing the ordinary liability upon the indorser.

Although in form and in common parlance it was a purchase of the note, yet, in substance, it was a loan by way of discount made by the bank to Wise; and the relation of debtor and creditor as between them was created.

Discount is the difference between the price and amount of the debt, the evidence of which is transferred; and the character of the paper with reference to its being business or accommodation paper is immaterial as respects the transaction being properly denominated a loan. *National Bank* v. *Johnson*, 104 U. S. 271; *ante* 25. Had the transfer been by delivery only, or by an indorsement without recourse, then, probably, it might be regarded as an absolute purchase of the note.

This is sufficient upon this point for the purposes of the present controversy. We are inclined however, in the absence of Federal or binding authority, as to the construction to be given this section 5136, Revised Statutes of the United States, to place our decision upon higher ground. A purchase may be made by way of

discounts equally as well as a loan may be made by way of discount. Discount means *ex vi termini*, a deduction or drawback made upon advances of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. *Fleckner* v. *Bank of U. S.*, 8 Wheat. 338, 350; and in the same case Mr. Justice STORY speaks of "a purchase by way of discount." If the party dealing with the bank assumes a responsibility, it is a loan; if he does not, it is an advance made by him in consideration of the transfer without recourse or by delivery. If a greater rate of discount is taken or reserved than the Bank Act allows, then the bank is liable to the penalties imposed by the act, but the title of the bank to the paper is not affected. The decision of the New York Court of Appeals in *Savery's Case*, 82 N. Y. 291, is much in point. See, also, the able discussion of the subject in the dissenting opinion in *Lazear's Case*, 52 Md. 126; 2 Nat. Bank Cas. 261. We think the logic of the opinion of the Supreme Court of the United States in *National Bank* v. *Johnson*, 104 U. S. 271; *ante* 25, leads to the same conclusion.

The defense relied on at the trial was that of a failure of the consideration of the note. Of course, as the assignment was before maturity, such defense cannot be successfully interposed if the appellant bank took the note in good faith and without notice. It appears from the evidence the note was taken by the cashier of the bank in the usual course of business, and that he had no notice or knowledge of the contract of warranty in regard to the machine sold or of any failure of the consideration of the note. There was a like lack of notice or knowledge on the part of all the directors and officers of the bank, except McNeill. McNeill was president of the bank at the time the note was executed and until January, 1882, and was vice-president from the latter date until after the supposed failure of the machine to do good work, in the harvest of 1882, and after the assignment of the note. He, as a mutual friend of the payee, Wise, and the appellant, wrote both the note and the contract of warranty; and he also knew as such friend, prior to the transfer of the note, that appellee claimed the machine had failed to work as warranted, and had demanded a return of the note. It also appears that McNeill never informed any of the directors and officers of the

bank of the contract between Wise and appellee, or of the supposed failure of consideration; that the cashier and book-keeper did the general business of the bank and purchased the notes, and that the only part McNeill ever took in the purchase of notes was that if he was present, the cashier might sometimes ask him about notes he was buying, and that he did not know the bank had taken the note in question until two or three months after it had been assigned.

The general management of the business of a National bank is confided to a board of directors and this board appoints the president, vice-president, cashier and other officers. The National Bank Act nowhere defines the duties of these several officers, but authorizes the board to do so; and in this case the board does not appear to have exercised that authority. The president and vice-president, then, of appellant must be regarded as having only such powers and duties as are necessarily incident to their respective offices.

The president of a bank has very little inherent power; it is his duty to preside at the meetings of the board of directors and he has charge of the litigation of the bank; and other than these he has no power inherently over and beyond another director. *Hodge's Exr.* v. *Nat. Bank*, 22 Gratt. 51. We are not advised the vice-president of a bank has inherently any other than contingent duties to perform, unless it be he is also a member of the board of directors. As matter of fact, these officers may frequently transact important business for the bank. Sometimes it is done by express authority from the directors, and sometimes, if done with the knowledge and approbation or the tacit sanction of the board, it may be regarded as legalized by the principles of ratification or usage. Morse Banks, 128. The powers and duties of a cashier are much more numerous. In all transactions in which the bank may lawfully engage, the cashier is its managing agent. While he is the business officer of the bank, it is in the sense of one who transacts the business, and not of one who regulates and controls it. Morse Banks, 137.

Without discussing the relative powers and duties of a board of directors and a cashier, it may perhaps be safely assumed

that if the notice in this case had been to either one or the other, it would have been notice to the bank.

Parsons states the rule of law to be that a notice to a corporation binds it only when made to an officer whose situation and relation to the corporation imply that he has authority to act for the corporation in the particular matter in regard to which the notice is given. 1 Pars. Cont. 77. In Story Agency, § 140, and following sections, the subject under examination is quite fully discussed, and in section 140b, it is said: "If we examine the subject upon general principles, and with reference to practical convenience in the administration of banks, it might seem that to bind the banks, the notice ought to be given to the proper agents of the bank legally intrusted with the particular business to which the notice relates. If the business be legally confided to the cashier, notice to him ought to bind the bank. If it is to be done by a board of directors, as, for example, in the discounting of notes, they ought to have official notice of any illegality or informality affecting the notes, and notice to one director only, unknown to others of the board, ought not to bind the bank."

In Angell and Ames Corporations the same subject is discussed in sections 306, 307 and 308. It is there said, among other things, that notice to either of the directors while engaged in the business of the bank is notice to the bank; but that where a director is not engaged in the business of the bank, notice to him will not be deemed notice to the bank. And it is also stated notice to the director of a bank will not be deemed notice to the bank unless the director be constituted an organ of communication between the bank and those who deal with it; and that a private communication of a fact to a director, or his knowledge of it from rumor, is clearly no notice to the board unless he communicates the fact to the board.

The rule is stated in Morse Banks, 109, to be that if the director acquired the knowledge in his official capacity, or in the course of, or in relation to any special matter or function of which he had charge as an agent of the bank, then he knows it as a director, and the law holds that the bank also knows it; but that if he acquired it solely as any other private individual might have acquired it, and not officially, or in connection with his discharge

of the functions of his office, or if it did not relate to any matter in which he owed a peculiar duty to the bank, he does not know it as a director, and the bank does not know it by implication from his knowledge, unless, as a matter of fact, he communicated it to his co-directors or such of them as are present at the meeting.

Tested by the rules of the law as stated above, it would seem the knowledge of McNeill was not notice to the bank, and that the plea of a failure of consideration is no defense under the circumstances of this case. The rulings of the court upon the instructions were in conflict with the views herein expressed, and were erroneous.

The judgment is reversed and the cause remanded.

Reversed and remanded.

First National Bank of Monmouth v. Brooks.

(23 Ill. App. 238.)

Certificate of deposit — ultra vires — embezzlement.

A National Bank by its cashier issued its certificate of deposit for money to be paid on a note of the depositor or lent for his use. *Held*, that the bank was liable thereon although the cashier embezzled much more of the bank's funds.

IN error to the Circuit Court of Warren county.

Grier & Dryden and *Kirkpatrick & Alexander*, for plaintiff in error.

Stewart & Stewart, for defendant in error.

Lacy, J. This was an action in *assumpsit*, by defendant in error against plaintiff in error, based on the following certificate of deposit, viz.: "Deposited with First National Bank, by William H. Brooks."

"MONMOUTH, ILL., *June* 2, 1883

"Dolls. Cents.

"Currency..... ..... $800.

"To be indorsed on his note held by John Brown, or loaned for his use case Brown won't receive said money.

"B. T. O. HUBBARD, *Ca*

The character used was always for that of cashier. The "C is an abbreviation of the word "cashier," as Hubbard swears. I fendant in error passed the money over the counter of the ba to the cashier while it was in good credit and transacting its or nary business. The money was never paid to Brown or loaned repaid to Brooks. It was put in the general funds of the ba not in the private box of Hubbard. It was not put on the boo of the bank, but an account of it was kept by the cashier by wh is called a "deduct tags," which were kept for the accommo tion of the public, was paid, it was erased from the tag, and wh partly paid, credits were made on the tag. At night it was habit of the cashier to figure the amount of items on the tags a deduct it from the cash, and then the balance would repres the money belonging to the bank. The tag remained there the time the cashier was there, as he swears, in the little tin b in the day-time on the counter, and in safe at night. The ba was closed April 7, 1884. The bank examiner, W. C. Oakl took possession of the assets of the bank, and on May 2, 18 turned over the assets to the receiver, Guy Stapp, who refused allow the claim of the defendant in error; on May 7, 1884, t suit was therefore brought.

The cashier, Hubbard, was a defaulter to the bank for a la amount, much more than the amount of this deposit, and afterward, as is said, prosecuted and convicted of the crime embezzlement and sent to the penitentiary.

The defense was that the money was received by Hubbard his private capacity and not as cashier of the bank, and that made use of the money himself, and that the bank is not resp sible. The jury found for the defendant in error, and the co overruled the motion for a new trial, and entered judgm on the verdict. To reverse this judgment this writ of erro brought.

The certificate of deposit, whatever interpretation may be placed on it, is in writing, and we are not obliged to resort to uncertain parol testimony to determine its terms. It purports on its face to be an ordinary contract for the general deposit of money with two requests thereunder written. First. An order to pay the amount of the money therein named to John Brown on defendant in error's note held by him, if he would receive it. Second. In the contingency that Brown would not receive it the plaintiff in error was ordered to loan it out for defendant in error's use. This certificate was undersigned by B. T. O. Hubbard, cashier of the bank. By signing the certificate of deposit and accepting the money, the plaintiff in error in substance undertook to carry out the two orders or requests

They might have been withdrawn by defendant in error at any time before Brown notified the plaintiff in error of the acceptance of the trust money held by it, and before the money was loaned.

But the plaintiff in error claims that this undertaking of the cashier in the name of the bank was *ultra vires*, both as to it and his duties as cashier. That inasmuch as he exceeded his authority to act for the bank and the latter's power under the charter, the entire transaction should be regarded as though Hubbard had taken the money into his own hands on his individual account, and had agreed with the defendant in error to carry out the requests of the writing without reference to plaintiff in error. Unless this contention of plaintiff in error can be legally sanctioned the theory of the defense entirely fails.

Let us inquire then whether the cashier had so far exceeded his powers and those of the bank as to render the accepting of the defendant in error's money on behalf of the plaintiff in error entirely void as a contract with the bank.

The fifth section of the National Banking Law of June 3, 1864, under which the plaintiff in error was organized, gives power to the board of directors to appoint, among other officers, a cashier, and define his duties. The seventh section authorizes all banks organized under the act, by its board of directors or duly authorized officers or agents, to exercise,

"subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes,

drafts, bills of exchange and other evidences of debt, by receiving deposit by buying and selling exchange, coin and bullion, by loaning money on pe sonal security, and by obtaining, issuing and circulating notes according the provisions of this title."

The cashier is the executive officer of the bank, and transac most of its business. His acts, to be binding upon the ban must be done within the ordinary course of his duties, and whe so done it is *prima facie* evidence that they fall within the sco of his duty. No proof of an authorization of the board of d rectors is required. *Fleckner* v. *Bank of U. S.*, 8 Wheat. 33 Some of his duties are to keep all the funds of the bank, its note bills and other choses in action, to draw checks, to withdraw th funds of the bank where they have been deposited, receive d posits and issue certificates of deposit, and such certificates onl require the signature of the cashier. *Barnes* v. *Ontario Ban* 19 N. Y. 152. When money is deposited in a bank generally, is the property of the bank, and cannot be paid out without th order of the depositor. *Carroll* v. *Cone*, 40 Barb. 220.

The cashier had the power to receive for the bank the defend ant in error's money on general deposit, and the terms of the ce tificate show that he did so receive it.

The identical money was not to be kept separate, only the san amount was ordered to be paid out to John Brown, or loaned case John Brown would not receive it. The money was pa over to the cashier at the counter of the bank by defendant error, and was received for the bank, as the certificate show This much of the transaction was not outside of the ordinary d ties of the cashier or *ultra vires* as to the bank, and it was ce tainly for its benefit to receive the deposit, nor was it *ultra vir* to accept the money to be paid to John Brown in case Brow wanted it. For both the receiving and the paying out of th money were within the ordinary duties of the cashier, and it cou make no difference whether the defendant in error gave the ord to pay it out at the time the deposit was made or afterward. there was any thing the bank was not able to do it was to loa the money on defendant in error's account. If the bank was u willing to proceed to loan the money in case such remote conti gency arose, it had only to notify the defendant in error and pa the money back to him or on his order. No liability can attac

to the bank on account of the failure to loan the money under the contract. That portion of the undertaking would alone be void. Authority supporting this view is found in the case of *Bank of the United States* v. *Dunn*, 6 Pet. 51.

Dunn was about to become the indorser of a promissory note, whereupon the president and cashier of the bank represented to him that he would never be called upon to pay it; that the bank had a deposit of collateral stock of another bank left by the principal maker of the note as security, and that his signature was a mere matter of form. On the faith of such representations he signed the note. This defense was excluded by the court below, and on appeal to the Supreme Court of the United States that court held it was properly excluded and affirmed the judgment against Dunn on his indorsement. The court in passing on the point said, "that the most decisive objection was that the agreement was made with persons who had no power to bind the bank. It is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in their ordinary duties.

"All discounts are made under the authority of the directors, and it is for them to fix any conditions that may be proper in loaning money. The assurances relied upon, if made, were not made by persons authorized to make them. The bank is not bound by them, nor would it be bound if the assurances had been in so specific and direct a manner as to create a personal responsibility on the part of the cashier and president."

It will be observed in the above case that the court held that portion of the contract good that came within the power of the president and cashier to make, to-wit, the taking of an unconditional indorsement from Dunn. That portion done without power which was in favor of Dunn was rejected.

So here the plaintiff in error's cashier was fully authorized to take deposits for the bank, but in attaching a stipulation to it that he was not authorized to make, such condition would be void; but the contract to repay in such cases implied from the fact of deposit would be good as to his principal. The defendant in error, as appears from the certificate, was willing to trust the plaintiff in error with his money but not the cashier individually.

The case of *United States* v. *City Bank of Columbus, Ohio* 21 How. 356, is not in point or parallel to the case at bar There the cashier of the bank sent a letter to Thomas Corwin the Treasurer of the United States, stating that the bearer, Col Wm. Minor, a director of the bank, was authorized on behalf o the bank to contract with the government for the transfer o money from the east to the south and west. The letter being presented by Minor to Corwin, the latter contracted with him in behalf of the bank to receive $100,000 and transfer it from New York to New Orleans free, and gave Minor a draft on the United States treasury in New York city for that sum. Minor gave hi receipt for it, drew the money and never showed up with it. The United States sued the bank. The court below instructed th jury in favor of the bank, and on appeal the Supreme Court sus tained the instruction, and it was held that as the cashier had n authority from the board of directors he could not appoint Mino to enter into such a compact or go to Washington and receive th money to transfer it to New Orleans.

But suppose Corwin had paid this money over the counter o the bank to the cashier and taken a certificate of deposit with a agreement that the bank should transfer it to New Orleans fre of cost, would not the bank have been liable for the amount i case the cashier had absconded with the money? The cashie cannot delegate his authority to any other person to receive money on deposit for the bank, much less send a messenger out of th State to receive it without authority from the directors.

The case of *Bushnell* v. *C. C. Nat. Bank*, 10 Hun, 378,* seems to be quite in point. Bushnell and one Shaw entere into a contract for the sale and delivery of ten thousand barrel of crude petroleum, September 24, 1874, at a stipulated price, t be delivered to Shaw at buyer's option any time from that date t December 31, 1874. The cashier indorsed the following agree ment on the contract:

"September 26, 1874, T. A. Shaw has this day deposited in the Chautauqu County National Bank of Jamestown, New York, $2,500, which is to be hel by us as security for the faithful fulfilment of the within contract."

Signed by the cashier.

* Modified, 74 N. Y. 290.

This contract was then delivered to Bushnell. Shaw losing on the deal to the amount of the deposit, and the bank refusing to pay according to agreement, Bushnell brought suit, and failing in the court below, an appeal was taken to the fourth judicial department of the General Term of the Supreme Court, which reversed the judgment of the court below.

The defendant set up *ultra vires* as against the plaintiff. The court by Judge SMITH, held that the "bank impliedly promised that in case Shaw failed to perform, the bank would pay to the plaintiff in damages thereby incurred $2,500." "The bank had power to receive the deposit. As an incident to that power, it had authority to assent to any terms or conditions respecting the use or disposal of the moneys deposited which the depositor saw fit to impose, provided they were not illegal or prohibited by defendant's charter. If Shaw had chosen to deposit it payable absolutely to plaintiff or his order, the receipt of it by the bank and the issuing of a certificate in accordance with those terms would have been strictly within its legitimate and ordinary business." The court held "that it could make no difference that the deposit was payable to the plaintiff upon the happening of a future contingent event and that the amount to be paid was contingent and uncertain; but was not to exceed the amount of the deposit." "It is said there was a trust created. In the same sense there is a trust in case of every bank deposit by one person to the use of another."

The instructions in the case at bar given for the defendant in error, complained of, commence with the hypothesis that "if the jury believe from a preponderance of the evidence, that defendant in error deposited in the First National Bank the sum of $800 — and if this was mingled with the money of the bank — then defendant in error could recover in this suit even if the cashier had taken out a much larger sum of money."

If the money, as the instructions suppose, was deposited with the bank and not with the cashier as an individual, the defendant in error has a legal right to recover, whether the money was afterward mingled or not. If the first fact of the deposit was true in the manner supposed it would be wholly immaterial whether the last one of mingling was or not. As the certificate shows the

money was contracted to be and was put into the bank by th cashier, who had full authority to receive general deposits, th right of the defendant in error to recover was complete withou the further act of mingling such funds with those of the bank from that moment the latter became the debtor of the former which might by the terms of the certificate of deposit be dis charged by paying the money to John Brown, or by loaning i out for the use of defendant in error. If the bank saw proper i might also discharge such debt by loaning it as required by th terms of the certificate, though it could not be compelled by law to do so, but if Brown would not receive the money and the plain tiff in error would not loan it, the liability to repay the sam amount of money to defendant in error or on his order or direc tion became fixed, and the debt could not be discharged by reaso of the embezzling of the funds of the bank by its cashier to greater amount than the deposit. If the deposit had been mad with the cashier as an individual and not as the legally authorize officer of the bank such a defense would be possible, but not othe wise. This was not the nature of the transaction. The defend ant in error as well as the cashier understood that the transactio was with the bank, and as a strong circumstance showing such in tent the money at the time was mingled with the bank's funds The undertaking by the bank to loan the money for the use o the defendant in error was not illegal as being against publi policy, or immoral, nor was there any express prohibition in it charter against such acts. Even if the plaintiff in error had ex ceeded its powers by its agreement to loan the money, the act t be done was not immoral or against public policy, nor was it eve prohibited by its charter, and therefore if it had proceeded to th execution of the contract so far as to receive the money in ques tion on deposit to await the opportunity to make the loan or pa it to John Brown, it would be estopped from setting up the ple of *ultra vires* to defeat recovery for the money so deposited, th very able Judge ALLEN, of New York, lays down the followin rule on the subject:

"When the acts of corporations are spoken of as *ultra vires* it is not intended that they are unlawful, or even such as the cor poration cannot perform, but merely those which are not withi

the powers conferred upon the corporation by act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds be applied solely for carrying out the objects for which the corporation was created. The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice; but, on the contrary, would accomplish a legal wrong." *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; 20 Am. Rep. 504. In the above case it is laid down as a further rule, and as being well settled, "that a corporation cannot avail itself of the defense of *ultra vires* when a contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." "If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail." These rules presuppose that corporations may enter into contracts through their officers and perform them, and the party with whom they contract may perform them, and yet such contracts be without the powers granted, and if the corporation or either party receive a benefit, it or he must make compensation after the contract is performed. But while the contract is executory, it may be repudiated by either party. In the mean time, if either party has received a benefit, he must make compensation on the principles of natural equity.

Applying these rules to the facts of this case, we find that the instructions presuppose that the cashier received the money in question on behalf of the bank from defendant in error as a general deposit and mingled it with the money of the bank, and that it became a part of the funds of the bank indistinguishable from any other funds. If the agreement to loan the money was *ultra vires*, either party to the contract might repudiate that part of it before the money was paid out or loaned under the agreement. If paid out or loaned, the bank could recover the usual compensation for its services, notwithstanding the acts performed might have been beyond its powers; on the other hand, defendant in error may recover from the bank the money received by it. The obligation, based alone on the grounds of estoppel, arose as soon as the money was received on deposit, and much more when

mingled with the funds of the bank. It became a debt due from the bank which the law would not allow it to deny, and a cause of action arose after demand and refusal to pay. The cashier, by authority of the directors, had possession of all the bank's funds, not the money in question alone, but all; and he fraudulently appropriated a large amount of its cash capital to his own use, and much more than the amount of this deposit. Why should defendant in error be charged with the defalcation any more than any other depositor? Because he authorized appellant to pay John Brown? That could not be, for it was a part of the cashier's legitimate duties to draw money out of the bank to pay depositors, or the debts of the bank at the order of depositors, regardless of whether the order was made at the time of deposit or afterward; and if in performing this duty the cashier stole the money, the loss should fall on the bank and not the depositor. He was the servant of the bank. After this money was received by the cashier on deposit, and much more of it mingled with the funds of the bank, defendant in error's claim against it was a chose in action, and not the subject of larceny; therefore the theft by the cashier must be borne by the bank If it be contended that the bank had no notice that the money so mingled with the funds of the bank was not the money of the cashier, and that by reason thereof it had an equitable right to set off the amount of money wrongfully abstracted by the cashier against the deposit of the defendant in error, it is answered that the want of notice cannot be set up against his equitable claim as an estoppel, for the reason that it has been put in no worse condition on account of want of notice. The money was not paid out to the cashier supposing the bank owed him. As a matter of fact, the bank did not owe him, but owed defendant in error, and the want of notice, if there was such want, which is not admitted, had no effect to cause the larceny. The plaintiff in error is in no worse condition on the account of the want of notice. The bank however is held to notice where the cashier receives the money by virtue of his authority as cashier as here.

What is said here is said in reference to the form of the instructions complained of and to show that they are not erroneous. As there was no serious contradiction as to the proof, it is not

necessary to discuss it further than to say it justifies the verdict. The judgment in the opinion of a majority of the court should be affirmed and is accordingly done.

WELCH, J. (*dissenting.*) I do not concur in the reasoning or conclusion reached by my brethren in this case. The eighth section of the act of Congress under which National banks are organized, makes them banking corporations with "all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of the act." The powers of National banks, being enumerated in the act of Congress by which they are created, the *expressio unius est exclusio alterius* if applied in the interpretation of this act would prohibit National banks from entering into such a contract as that claimed to have been entered into in this case.

"The deposits referred to in the act are deposits of money received by banks in the usual course of business and have none of the qualities of a bailment. The money deposited becomes the money of the banks, and the relation of debtor and creditor is created between the depositor and the bank." *Whitney* v. *First National Bank of Brattleboro*, 50 Vt. 398; 28 Am. Rep. 508; 2 Nat. Bank Cas. 69; same rule announced in *Wiley* v. *First National Bank of Brattleboro*, 47 Vt. 546; 1 Nat. Bank Cas. 905; *First National Bank* v. *Ocean National Bank*, 60 N. Y. 278; 19 Am. Rep. 189; 1 Nat. Bank Cas. 728; *Wickler* v. *First National Bank*, 42 Ind. 581; 1 Nat. Bank Cas. 533.

Angell and Ames Corporations, 256, says: "In deciding whether a corporation can make a particular contract, we are to consider in the first place whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if they are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purposes of its existence, or whether the contract is entirely foreign to that purpose."

The contract, if any, between the plaintiff in error, is based upon this paper:

"Deposited with the First National Bank by Wm. H. Brown:

"MONMOUTH, Ill., *June* 2, 1883.

"Currency—$800. To be indorsed on his note held by John Brown, or loaned for his use in case Brown won't receive said money.

"B. T. O. HUBBARD, *Ce.*"

Judge WAYNE, in *United States* v. *City Bank of Columbus*, 21 How. 356, says: "The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time in the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all the money and notes of the bank; delivers up all discounted notes and other securities when they have been paid; draws checks to withdraw the funds of the bank when they have been deposited, as the executive officer of the bank, transacts most of its business." After this summary of the duties and powers of the cashier, the same judge says, "that he may not make any contract involving the payment of money not loaned in the usual or customary way, or purchase or sell property, or create an agency of any kind for the bank unless expressly authorized by those to whom it has been confided to manage the business of the bank, both ordinary and extraordinary." The same rule as to the limits of the authority of bank officers, to bind the corporation to acts and contracts within the ordinary sphere of their duties and the scope of the ordinary business, is announced in the following cases: *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46–70; *Fleckner* v. *Bank of United States*, 8 Wheat. 338; *Fulton Bank* v. *New York and Sharon Canal Co.*, 4 Paige, 127. Under the rule announced in the authorities, *supra*, had Hubbard, as the cashier of the bank, authority to receive for the bank money on the terms stated in said paper, and to bind the bank therefor? As said in *Whitney* v. *First National Bank of Brattleboro*, 50 Vt., *supra*: "The deposits referred

to in the act are deposits of money received by banks in the usual course of business, and have none of the qualities of a bailment. The money deposited becomes the money of the bank, and the relation of debtor and creditor is created between the depositor and the bank;" same rule announced in *Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94; *Maine Bank* v. *Fulton Bank*, 2 Wall. 252. This is the character of deposit which by the National Bank Act, *supra*, the plaintiff in error was authorized to receive, and in receiving such a deposit the cashier would be acting within the scope of his authority, and the bank by his act would become a debtor to the depositor. Does the paper signed by Hubbard, *supra*, show the reception by him of such a deposit for the bank? In my opinion the alleged contract is entirely foreign to the purpose of the plaintiff in error corporation, and is *ultra vires* and imposed no duty or obligation upon the bank. *Bullard* v. *Banks*, 18 Wall. 385; *Hood* v. *Armory*, 2 Cr. 107. The defendant in error in depositing his money with Hubbard was under the law required to know whether he had authority as cashier of plaintiff in error to receive it on the terms fixed by him, and, as I think, I have shown that no such authority existed. The money must have been left with Hubbard as his agent, and not deposited with the plaintiff in error. This view is sustained by Hubbard, who says: "Brooks came to me and gave me the money, and requested me to pay it to Deacon Brown, and in case Deacon Brown would not receive it, to loan it out for him. It was a personal request to me." Brooks and Hubbard both seemed to realize that Hubbard had no authority to receive it for the bank on such terms. It was a "personal request" to Hubbard to make the application of the money. If Hubbard, as the cashier of plaintiff in error, was not acting in the limit of his duty as such cashier when he received the money from Brooks, then he received the money as the agent of Brooks. *Man. Co.* v. *Lydig*, 4 Johns. 377; *Satislee* v. *Grant*, 1 Wend. 272; *Thatcher* v. *Bank of New York*, 5 Sandf. 121; *Lloyd* v. *Bank*, 3 Harris (Pa.), 175; *Lithbridge* v. *Phillips*, 2 Stark. 544. Even if it should be conceded, which I do not, that the plaintiff in error could receive money on the terms stated in the paper signed by Hubbard, *supra*, that would make it a gratuitous un-

dertaking, and as such itwould only be responsible for gro negligence. Whart. Neg., § 47; *Edson* v. *Weston*, 7 Conn. 27 *Beardsly* v. *Richardson*, 11 Wend. 25; *Sandusky* v. *McFa land*, 3 Dana, 204.

I hold that no liability on the part of plaintiff in error wa incurred on the paper given by Hubbard to the defendant i error. Has any thing transpired since to create a liability on th part of plaintiff in error to the defendant in error? Hubbar states: "I did not pay it to Deacon Brown, I did not loan it fo Brooks, I put it in the general funds of the bank. It was kep with some other items on a little memorandum paper I kept i the drawer, called a 'deduct tag,' in the cash drawer for accon modation. It was so I could pay it to Deacon Brown when h called for it." There was no entry made upon the bank book of this money; if there had been, it should have been placed t the credit of Hubbard, it having been left with him to pa to Brown or loan for Brooks. If it had been placed to th credit of Brooks it would have required the check of Brooks t have used it. What was written on the "deduct tag" in refer ence to this money we do not know. It is certain there wa nothing written upon it which would have prevented Hubbar from at any time withdrawing the money. It was not placed t his credit on the books so that his check would have been neces sary to withdraw it. It was not placed to the credit of Brook so that his check would have been necessary to withdraw it. Th evidence of the directors of the plaintiff in error shows that the did from time to time and repeatedly count the funds and com pare them with the books; that no one of them ever heard o the Brooks money or found any such overplus in the cash; tha on some occasions balances were corrected through "deduct tags," but nothing is known of the Brooks money. Hubbard state the "deduct tag" was left there; no one else connected wit the bank remembers to have seen it or knows what became o it. The only basis on which Brooks was entitled to recover wa that the money was received from Hubbard and mixed with th funds of the bank, and was never withdrawn from the bank b him or by his authority.

Various errors are assigned as to the giving, refusing and modi fying of instructions.

The instructions given for the defendant in error authorized the jury to find for the defendant in error, although the jury might believe that Hubbard took from the funds of the bank a much larger amount of money than claimed in this case. In my view the evidence conclusively shows that Hubbard had not only withdrawn the money left by Brooks with him, if it was ever mixed with the funds of the bank, but also had withdrawn all of the money of the bank. Yet under the instructions for the defendant in error the jury were authorized to find for defendant in error. This, notwithstanding Hubbard says "I so placed it that I could withdraw it." He must have exercised that right to withdraw it, for he left no money in the bank when he left it. In the view I take of this case, the instructions given for the defendant in error should not have been given, and the instructions given for plaintiff in error should have been given without modification.

Judgment affirmed.

First National Bank of Centralia v. Marshall.

(26 Ill. App. 440.)

Liquidation — new bank — stockholders' rights — estoppel — good-will.

A National bank went into voluntary liquidation. All the stockholders but one united in organizing a new National bank under a different name. He knew that the greater part of the assets were sold to the new bank, and he accepted dividends from nearly all such assets. *Held*, (1) that he had no right to share in the earnings of the new bank; (2) the old bank had no good-will to sell independent of the value of the unexpired lease of its banking-house.

APPEAL from Circuit Court of Marion county.

McCartney & Casey and *Casey & Dwight*, for appellants.

W. S. Forman and *Jas. Watts*, for appellee.

Pillsbury, J. Section 5220 of the National Bank Act provides that "Any association may go into liquidation and be

closed by the vote of its shareholders owning two-thirds of stock." The sections following provide in detail for winding the affairs of the bank when such vote has been taken. It clear that the shareholders had the right to put the First Natio Bank into voluntary liquidation rather than to permit its char to expire by limitation, as it would have done on March 25, 18 The appellee, as one of the shareholders, voted all his stock favor of that course.

When the bank ceased doing business on February 25, 1885, became the duty of those placed in charge of its affairs for t purposes of winding up its business to use all reasonable effort realize out of the assets as much as possible and distribute the p ceeds among the shareholders. When this has been done it clear that the value of the stock can only be measured by t value of the assets. It is not contended by appellee, neither cou it well be, that the First National was not legally put into liquid tion. The appellee states in his testimony taken on the trial th he voted for liquidation, and he knew this course had its inc tion in the desire to get rid of him as a stockholder by the orga izing of another National bank. There can be no doubt of t right of the stockholders, after such vote was taken, to organize new bank and to dispose of the stock to whomsoever they s proper, so long as they committed no fraudulent act to the inju of the appellee. The complainant, with full knowledge of wh had been done in putting the one bank into liquidation and t organizing of a new one, and the disposition of the assets of t bank by its directory, for he was furnished with a detailed sta ment by Mr. Kohl, received a cash dividend of $100 upon ea share of his stock, and joined with the officers of the bank dividing up many of the remaining bonds and securities, sele ing those he desired to take and thereby receiving $50 per sha additional. Instead of objecting to the action of the directo and Mr. Kohl and refusing to take his share of the proceeds rived from the sale of the assets and demanding recognition a stockholder, or demanding an equal amount of stock in the n organization and offering to pay for it, as others did, he volu tarily, with a full knowledge of the facts, receives his *pro ra* share of each and every dividend declared, and his explanation

this act is that he "never knew of any one objecting to receiving money," that he knew the new bank would be organized, and he left, but he intended "to hold his grip."

He further says that when Mr. Kohl presented him with the statement of the disposition of the assets he "had no doubt to base an objection upon," although admitting in fact that he knew how the assets of the bank were disposed of. He has also received two additional dividends, amounting to $5.50 per share, and taken the money without objection, making in the aggregate $155.50 upon each share of capital stock held by him of the par value of $100, and the remaining assets, amounting, as estimated, to $4,536.39, consisting of notes and a farm which had not been converted into cash at time of trial. As to these remaining assets, we think the proof shows that when Mr. Kohl called appellee's attention to them, at the time he paid the last dividend, he told appellee that if he wanted the matter closed up at once, he, appellee, could buy them or they would buy them, and appellee then directed Mr. Kohl to keep on the way he had been doing.

Now, after receiving his share of the assets disposed of, belonging to the First National, under the circumstances stated, we are at a loss to comprehend how he can claim or be pecuniarily interested in the "old National bank," or entitled to any of its earnings.

He is of course entitled to a fair administration of the assets of the defunct bank, the First National, but upon what basis he can claim that his interest in such funds is to be measured by the present value of the stock in the new National bank we cannot perceive.

And yet the court below in its decree found that his stock in the First National Bank was of the value of $190.50 per share, when the assets disposed of would not perhaps exceed in value $160 upon the share.

The record is barren of any proof that the assets of the First National Bank, in which appellee was a large stockholder, consisting of bonds and bills receivable, and furniture and fixtures, were not sold at the current rates in the stock markets except the fixtures and furniture, the value of which was fixed by the opinion of witnesses varying from $1,000 to $1,600. There is no evi-

dence in the record that the United States bonds were sold to th old National bank at a less price than current quotations, nor tha the bills receivable did not bring all they were worth, and as the $40,000 worth of local bonds and securities divided betwee the stockholders, the appellee cannot complain, as he joined in th division and made his own selection for the stock, or overplu dividend of $50 per share. We have been unable to find an evidence in the record that justifies the action of the court be low in finding that the stock of the appellee in the First Na tional Bank was worth, when the vote for liquidation took effec $190.50 per share. As we have said, if the assets of that ban were properly administered, the value of the property of th bank would determine the value of the stock, and if the asse were disposed of for their fair market value, the appellee had n reason to complain. We think he is estopped from insisting tha the greater part of the assets were sold to this new organizatio as he knew they were disposed of when he accepted his share o the proceeds; but if he can establish that by an unlawful com bination between the two banks, the assets were not sold for the fair market value, he can have an account taken of the value o his stock, based upon such fair value of the assets of the bank, an have a decree for such difference.

A mere honest difference of opinion between him and the othe parties authorized to wind up the affairs of the bank will no however render those officers or the First National Bank liable t account, but if it should appear upon a re-trial of this case tha the First National Bank, through its custodian of the assets of th bank, had fraudulently disposed of the property of the bank fo the purpose of aiding themselves at the expense of appellee, b selling them for less than their fair value, those taking part i such fraudulent practices must be held to respond to complainan below, and if it should appear that the old National bank was party to such fraud, a decree might well go against it to accoun for the fair market value of all assets received by it for less tha their fair value. We think the complainant is entitled to a fa and honest disposition of the property of the bank, and is entitle to receive his just and fair proportion of the proceeds thereof, ac cording to the amount of his stock in the bank compared with th

entire capital. At the same time we hold that he cannot claim to be a stockholder in the new bank, nor entitled to share in its earnings, nor object to the transfer of the assets of the bank in which he was a stockholder to the new organization, as, with a full knowledge of all the transactions, he took his money arising out of the payments made by the latter bank for such assets. The evidence is very conflicting as to the value of the fixtures, safe, books and blanks of the First National, sold to the old National bank. They were carried on the books of the former banks at the value of $1,000, and were sold to the new bank for $1,000, and if the correctness of the decree depended upon this item alone, we should not be disposed to interfere with it, but we are of the opinion that the court erred in finding from the evidence in this record that appellee's stock was of the value of $190.50 per share, upon the ground that he was equitably entitled in some way to a share in the profits of the old National bank, and without determining whether the assets of the First National Bank had been fraudulently disposed of for less than their value to the injury of the appellee. What we have said disposes also of the question of the "good-will" of the First National Bank, which it is claimed was obtained by the old National bank, as the lease of the building was assigned to it and the business carried on in the same way.

The First National Bank voluntarily closed its doors as a banking institution on the 25th day of February, 1885, and then ceased to exist as a banking institution. It did not, neither could it, thereafter dispose of its franchise, held by it under the law. It had no "good-will" to dispose of independent of the value of the unexpired lease for the bank building. This lease was made by appellee to the First National Bank, or its successor, in September, 1883, for five years, and the unexpired term was clearly an asset of the bank which should have been disposed of to the best advantage.

Upon a sale of it, the "good-will" would necessarily enter into consideration in determining its value. *Dougherty* v. *Van Nostrand*, 1 Hoff. Ch. 68; *Austin* v. *Bays*, 24 Beav. 598.

If the parties appointed to wind up the business of the First National Bank have acted in good faith, and with reasonable

diligence, they should be allowed a fair compensation for their se vices before final distribution is made of the remaining assets.

For the reasons stated, the decree will be reversed and the cau remanded for further proceedings

Reversed and remanded.

Heath v. Second National Bank of Lafayette.

(70 Ind. 106.)

Mortgage — power to purchase mortgaged land.

A National bank may purchase, at sheriff's sale, land mortgaged to it as s curity for a previous debt.*

FROM the Tippecanoe Circuit Court.

R. C. Gregory and *W. B. Gregory*, for appellants.

J. M. Larue and *F. B. Everett*, for appellee.

Scott, J. Hull sued Mary Heath, the appellant, on a note an mortgage, in the Superior Court of Tippecanoe county. The a pellee, the Second National Bank, and others were made parti to the foreclosure, as junior incumbrancers. Judgment was ob tained by Hull against Mary Heath on the note, and a decre was rendered on the foreclosure against the other defendant The debt of the bank, the appellee in this case, was found an adjudged to be a second lien on the real estate described in th decree of foreclosure; and the decree provided that the propert should be sold, and the proceeds of the sale be first applied t the payment of Hull's judgment, and the surplus be applied t the payment of the debt of the bank. The land was sold on th decree, and bought by the bank. A certificate of purchase wa issued, and at the expiration of a year, the property not havi

*See Gould & Tucker's Notes on R. S. of U. S. 930; Farmers', etc., Nat. Bank v. Wa lace, 45 Ohio St. 152.

been redeemed, the sheriff made a deed to the bank for the property.

This action was by appellee, against the appellants, for the possession of the property. The complaint was in the usual form. Answer, general denial. Trial by the court; finding for the appellee; motion for a new trial overruled, and exception; and judgment on the finding.

The error complained of, and assigned in this court, is the overruling of the appellants' motion for a new trial.

The counsel for the appellants have presented and argued two questions:

First. That a material part of the decree was omitted, in the certified copy issued by the clerk to the sheriff, viz.:

"Any surplus that may remain thereafter to be applied to the payment and satisfaction of the lien of the Second National Bank."

The learned counsel, when the brief was written, were laboring under a misapprehension, as to the state of the record.

The next question argued is, "that the appellee had no power, under its charter, to purchase this land, on this decree, in favor of Hull, against the appellants."

Section 5137 of the Bank Act, Revised Statutes of the United States, page 999, provides, that

"A National banking association may purchase, hold and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."

We are of opinion, that under these provisions of this statute, the appellee had the power to purchase the property in controversy, under the decree above referred to.

The judgment is affirmed, at the costs of the appellants.

Petition for a rehearing overruled.

Turner v. First National Bank of Madison.

(78 Ind. 19.)

Judgment — proof of — assignee of sheriff's certificate of sale of lands — title in stranger — amendment of return — delivery of deed — date — National bank — power to acquire land. Sheriff's deed — date — delivery.

In a suit by the purchaser at execution sale to recover lands so purchased from the execution defendant, the judgment entry is sufficient proof *prima facie* of the judgment, and the admission of the pleadings is harmless error.

In such suit the defendant may not prove title in a stranger, as against the assignee of the sheriff's certificate, who receives the sheriff's deed thereon.

A sheriff may amend his return to process, by leave of the court, even after the expiration of his term of office.

A National bank may take title to real estate in discharge of previous indebtedness.

The date of a deed is *prima facie* evidence of the time of its delivery.

FROM the Jefferson Circuit Court.

E. R. Wilson, for appellants.

C. A. Korbly, for appellee.

Niblack, J. The First National Bank of Madison brought this action against William S. Turner and Eliza A. Turner, his wife, to recover the possession of, and to quiet its title to, an eighty-acre tract of land in Jefferson county.

Both defendants answered in general denial.

Mrs. Turner also filed a cross-complaint against the plaintiff and her co-defendant, alleging that, on the 7th day of October, 1859, her husband and co-defendant purchased the land described in the plaintiff's complaint, together with other lands, for the sum of $2,000, and received a deed of conveyance therefor; that previous to his said purchase he procured from her the sum of $500, to be paid as purchase-money, and which was paid as such, on said lands, and in consideration thereof it was agreed by her said husband that said money should be a lien on said lands for the repayment of the same to her, with ten per cent interest thereon, he to pay, and having since paid, the remainder of the

purchase-money out of his own private means; that her husband was to hold said lands in trust for her until she was reimbursed for the money so advanced by her, and interest thereon, of all which the plaintiff had notice; that said sum of $500, or any part thereof, had never been repaid to her. Wherefore she demanded that a lien against the land claimed by the plaintiff be decreed to her, and that she might have all other proper relief. Issue was joined on the cross-complaint. A jury returned a general verdict for the plaintiff.

The defendants severally interposed a motion for a new trial, both assigning the same causes, and also moved in arrest of judgment; but their motions were, each in its order, overruled, and the plaintiff had judgment on the verdict.

Error is assigned upon the overruling of the motion for a new trial.

The plaintiff, to establish its title to the land, relied upon a sheriff's sale made upon a judgment of the Jefferson Circuit Court, in a suit in which the State, on the relation of one Roberts, as guardian, was plaintiff, and the defendant William S. Turner and others were defendants.

Before offering that judgment in evidence, the plaintiff, over the objections of the defendants, introduced and read in evidence certain papers purporting to be the complaint, answer and reply in the cause in which it was rendered.

It is objected that these papers were not properly identified before they were so introduced and read, and that the record of a cause cannot be put in evidence in such a fragmentary form. It is proper for a party offering a judgment in evidence, to first read the pleadings in the cause, to show that the court had jurisdiction to render the judgment. But in a case like this it is unnecessary to put the pleadings in evidence upon which the judgment was rendered.

As between the purchaser at a sheriff's sale and the execution defendant, it is only necessary to show the judgment, the execution, the sale and sheriff's deed. *Shipley* v. *Shook*, 72 Ind. 511; *Mercer* v. *Doe*, 6 id. 80; *Frakes* v. *Brown*, 2 Blackf. 295; *Armstrong* v. *Jackson*, 1 id. 210; 12 Am. Dec. 225; Rorer Judicial Sales, § 807. Waiving all discussion of the specific objections

urged to the reading of the complaint, answer and reply, as abo
stated, it is evident that the appellants were not injured by t
introduction of those papers in evidence.

It was made to appear by the evidence that one Graham v
the sheriff who sold the land in suit upon execution, and that c
Comely became the purchaser; that Comely borrowed the mon
of the appellee with which to pay the purchase-money; that c
Whitney, an officer of the bank, became the surety of Come
for the repayment of the money so borrowed; that Comely
signed his certificate of purchase to Whitney to indemnify him
such surety; that Comely made default in such repayment; th
thereupon Whitney assigned the certificate of purchase to the a
pellee in payment, or to secure the payment, of the money b
rowed by Comely; that afterward the appellee demanded, a
received, a sheriff's deed from one Gavitt as the successor
Graham.

The appellants contend that under all the circumstances c
closed by the evidence, the appellee was prohibited by the N
tional Bank Act from accepting an assignment of the certificate
purchase, and from taking a deed to the land in controversy, a
that hence the appellee derived no title from the sheriff's de
We do not however construe the prohibition against the g
eral power of National banks to acquire real estate as strictly
the doctrine contended for by the appellants would require us
construe it. A mere liberal construction is given to that pro
bition by the Supreme Court of the United States in the case
National Bank v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas.

Besides, the appellee received a conveyance to the land in d
charge of a debt previously contracted, which is one of t
methods by which a National bank is expressly authorized to
quire real estate. U. S. R. S., § 5137.

The appellants, as a part of their defense, offered to prove th
the certificate of purchase was assigned by Whitney to the a
pellee as collateral security merely for the debt owed by Come
but the court would not permit the proffered proof to be mad
and that ruling is also complained of by the appellants.

Proof of an outstanding title in some third person will ordi
rily defeat an action for the recovery of real estate, but in an

tion by a purchaser at sheriff's sale against the execution defendant, the latter is not, as a general rule, permitted to set up title in a third party as a defense against the purchaser's right to recover. *Hobson* v. *Doe*, 4 Blackf. 487; *Sherry* v. *Denn*, 8 id. 542; *Calloway* v. *Doe*, 1 id. 372; 3 Wait Act. and Def. 122, and authorities there cited.

A sheriff's certificate is assignable, and the assignee stands in the place of, and becomes in legal effect, the purchaser at the sheriff's sale. *Splahn* v. *Gillespie*, 48 Ind. 397. The appellee was therefore the purchaser at sheriff's sale of the land of the appellants, within the meaning of the rule laid down as above.

If however the proposed evidence had been admitted, it could at most have only shown that the appellee held the land described in the sheriff's certificate as the trustee of Comely, and this would not have defeated the appellee's right, as the holder of the legal title under the sheriff's deed, to recover the land thus held by the appellee.

On the trial the appellee, as a part of its evidence in chief, offered the return made by Graham, as sheriff, to the execution on which he sold the land. This return being objected to, was then withdrawn. Afterward the execution, with an amended return, was offered and admitted in evidence, over several objections urged by the appellants.

The bill of exceptions contains the following statement as to the amendment of the return and its admission in evidence as amended:

"And for the purpose of fully and properly presenting the question of the admissibility of said execution and said amended return upon said objections of the defendants thereto, it was agreed and admitted by the parties that the following facts were true and should be considered by the court in determining said questions, viz.: That said writ and original return thereto first offered to be given in evidence by plaintiff was filed in the clerk's office by James Graham, the then sheriff of said county, on the 26th day of April, 1875, and was by the clerk then recorded in execution docket 'G' therein, on page 147. That James Graham's term of office as sheriff expired in August, 1875, and that he has not been sheriff since, or in any other way since connected with

the sheriff's office. That said amended return was made by hi during the trial of this cause, and since the original return wa offered in evidence by the plaintiff; that he so made said amende return at the request of Mr. Korbly, counsel for the plaintiff, b leave of court first obtained; that at the time he so made it, h was not the sheriff, or acting in any official capacity under th sanction of an oath, other than the oath he took as sheriff, hi official oath; and the court taking into consideration all of sai matters, so admitted, overruled said objections."

The objections urged to the admission of the amended retur are:

1st. That as the original return had become a matter of record and as Graham's term of office had expired, the amendment wa wholly unauthorized, whether made with or without leave o court.

2d. That the court in any event had no power to authorize a amendment of the original return after it had been entered o record without notice to all persons who might be affected by th proposed amendment.

It may be regarded as well settled in practice in this State, tha a sheriff may, by leave of the court, amend his return in a give case, so as to make it conform to the facts as they occurred, afte his term of office has expired *Dwiggins* v. *Cook*, 71 Ind. 579 But it is not so well settled as to when, if ever, such leave o court can only be granted upon notice to the parties interested i the subject-matter of the return sought to be amended. Free man Executions, § 358; Herman Executions, 398. The questio as to whether this is a case in which notice ought to have bee given of the application to the court for leave to amend the re turn is not raised by the record, and is hence not properly befor us. The agreed statement of facts reserved no question as to th manner in which the court granted leave to make the amendmen objected to, as nothing is said in that statement as to the circum stances under which the leave was obtained, and as no exceptio seems to have been reserved to the granting of the leave now complained of. For aught that appears, full notice of the appli cation for leave may have been given, and we must assume tha the court did not transcend its powers in granting the leave. A

the trial, in connection with the testimony of Graham concerning the sale of the land on execution, a receipt from Roberts, the relator in the judgment, to him as sheriff, for a sum of money derived from that sale and other sales on the same execution, was read in evidence over the objection of the appellants, and of that they will complain. That receipt appears to us to have been competent as a part of the *res gestæ*. At all events, we are unable to see that the appellants were in any manner injured by its introduction in evidence. The court, in substance, instructed the jury that the judgment, execution, amended return and sheriff's deed were taken in connection with some other matters referred to, sufficient to make out a *prima facie* case for the appellee. The appellants argue that this was, in effect, taking the case away from the jury, and consequently wrong. It was the duty of the court to give a construction to the record and other written evidence in the cause; and as no valid objection has been shown to any of them, the instruction gave the judgment, execution, amended return and sheriff's deed the only construction which the court could have properly given them as evidence before the jury. The appellants also reserved exceptions to the third, fourth, fifth, sixth, seventh, eighth and ninth instructions given by the court at the request of counsel for the appellee, but no specific objection has been pointed out to any one of those instructions. The court also instructed the jury that the date of a deed is *prima facie* evidence of the date of its delivery, and in that we think the law was correctly stated as applicable to the subject to which the instruction related. Mrs. Turner's cross-complaint was not well sustained by the evidence. In relation to some of its most material averments the evidence was quite uncertain and unsatisfactory. We would not therefore be justified in holding that the verdict was not sustained by the evidence. Such a trust as that set up by Mrs. Turner cannot prevail against the face of the deed, unless it be fairly and clearly established by the evidence.

Other questions have been either argued or suggested by the appellants, but what has been said practically disposes of all matters that have been fully presented and argued as reasons for the reversal of the judgment.

Error is also assigned upon the refusal of the court to arre the judgment, but no argument has been submitted in support that assignment of error.

The judgment is affirmed, with costs.

Holmes v. Boyd.

(90 Ind. 332.)

Mortgage — foreclosure — who may bring suit. National banks — purchase mortgage on lands. Contract — not to sue — consideration — payment of i terest.

Where a note secured by mortgage is purchased by a bank, and indorsed its cashier, he may sue to foreclose in his own name, under the Code.

A National bank, lawfully holding a mortgage on real estate, may, to prote its interests, purchase a prior mortgage on the same real estate.

An agreement not to sue a promissory note which is due, in considerati of the agreement, by the purchaser of land mortgaged to secure it, to pay the end of each year interest not exceeding the rate provided for by th note, is without consideration, and suit invalid.

FROM the Boone Circuit Court.

P. H. Dutch, —— *Davidson*, —— *Baker*, *J. W. Clement O. P. Mahan*, *H. N. Spaan* and *F. Heiner*, for appellants.

G. W. Chapman and *U. J. Hammond*, for appellee.

Niblack, C. J. Action by John M. Boyd, cashier of the Firs National Bank of Thorntown, for the use and benefit of tha bank, against Ira N. Holmes and Amanda D. Holmes, his wife Patrick H. Dutch and Mary A. Dutch his wife, and Charles A Dryer, assignee in bankruptcy of the said Ira N. Holmes, and commenced on the 3d day of December, 1878. The complain alleged that on the 1st day of January, 1869, the said Ira N Holmes executed to one Armstrong Ross his promissory note for $3,000, payable on or before the 1st day of January, 1870, with out relief from valuation laws, and with ten per cent interest

from date; that on the 5th day of January, 1869, the said Holmes and wife, to secure the payment of said note, executed a mortgage on certain described real estate in Boone county, which was duly recorded; that on the 12th day of December, 1877, the said Holmes and wife executed a mortgage to the plaintiff, as such cashier, on the same lands to secure a prior indebtedness of Holmes to the bank in the sum of $7,000; that afterward it became necessary, in order to protect the interests of the bank in the mortgaged lands, that the plaintiff should purchase the note and senior mortgage executed to the said Ross, as above stated, and accordingly, on the 30th day of November, 1878, he as such cashier, purchased and received by proper assignment to him as such in writing, said note and mortgage from the said Ross, copies of which note, mortgage and assignments were filed with the complaint; that the said Charles A. Dryer, as such assignee in bankruptcy, and the said Patrick H. Dutch and Mary A. Dutch, all claimed to have some interest in the mortgaged lands and were all required to answer as to their said interests. Wherefore the plaintiff demanded judgment on the note and a foreclosure of the mortgage. Payments of interest were indorsed on the copy of the note filed with the complaint up to and including January 1, 1878. The last two indorsements of interest paid were as follows:

"January 1, 1887, received $300, it being the interest up to this date on the within note."

"Received on the within $300, being the interest to this date, January 1, 1887, (of) Mary A. Dutch."

Holmes and wife and Patrick H. Dutch demurred separately to the complaint, but the complaint was held sufficient as to them. Mrs. Holmes and Patrick H. Dutch made no further defense and Dryer made default. Holmes and Mrs. Dutch answered separately.

In her fifth paragraph of answer Mrs. Dutch pleaded in abatement that prior to the 1st day of January, 1878, she became the owner of the mortgaged lands and then continued to be such owner; that on the 5th day of January, 1878, she and her husband, Patrick H. Dutch, entered into an agreement with Armstrong Ross, who was then the owner of the note and mortgage

sued on, that she should pay the interest due on the note on t
first day of that month and interest at the rate of ten per cent f
the year 1878, to be paid on the 1st day of January, 1879, a
interest at the rate of eight per cent for the year 1879, to be pa
January 1, 1880; that in consideration thereof the said Ro
would extend the time for the payment of said note until the 1
day of January, 1880; that thereupon she paid to the said Ro
the sum of $300 in pursuance of said agreement; that upon
ceiving said sum of money said Ross reduced the said agreeme
to writing and signed the same as follows:

"Whereas, Mary A. Dutch has bought of Ira N. Holmes a certain tract
land in Sugar Creek township, Boone county, Indiana, on which I hold a mo
gage; and whereas she has this day paid me $300 interest on said note secur
by said mortgage, the same being the interest up to 1st day of January, 187
Now, then, if the said Mary A. Dutch shall pay me ten per cent inter
promptly for this year on said note and mortgage, on the 1st day of Janua
1879, and eight per cent interest for the year 1879, payable on the 1st
January, 1880, I agree to extend the payment of said note and mortgage t
years from this 1st of January, 1878, provided interest is paid as here
stated, January 5th, 1878.

"ARMSTRONG ROSS."

That the note and mortgage referred to in the foregoing agre
ment were the same note and mortgage described in the co
plaint; that the plaintiff afterward purchased the note and mo
gage with full knowledge of the existence of the agreeme
above set out, and had commenced this action before any furth
interest was due under such agreement. Wherefore she demand
that this action should abate.

Issue; trial by a jury; verdict for the plaintiff, finding th
the sum of $3,519.16 was due upon the note, and that the plainti
was entitled to a foreclosure of the mortgage.

A motion for a new trial being first denied, the court adjudg
that the amount found to be due by the jury was due upon t
note, and decreed a foreclosure of the mortgage.

Questions are made here upon the sufficiency of the complai
as against Holmes and wife and Patrick H. Dutch upon demurre
and upon the refusal of the court to admit the agreement
writing between Armstrong Ross and Mrs. Dutch, set out
above in evidence at the trial.

The first objection urged to the complaint is that the bank ought to have been the plaintiff instead of Boyd.

The bank doubtless might have treated the assignments of the note and mortgage as having been made directly to it, and have sued as the sole plaintiff, but these assignments made Boyd a trustee of an express trust, and hence he was authorized to sue without joining the bank, for the benefit of which the assignments were evidently intended. R. S. 1881, § 252; Dan. Neg. Instr., § 417; *Baldwin* v. *Bank*, 1 Wall. 234; *Waddle* v. *Harbeck*, 33 Ind. 231; *Heavenridge* v. *Mondy*, 34 id. 28; *Wolcott* v. *Standley*, 62 id. 198; *Garton* v. *Union City Nat. Bank*, 34 Mich. 279.

The next objection to the complaint is, that upon the facts averred Boyd was not permitted to purchase the mortgage from Ross for the bank, and that for that reason the assignment of the mortgage to Boyd was void.

It is true that National banking associations cannot purchase, hold or convey real estate except in certain specified cases.

Some of these excepted cases are where real estate is mortgaged to such associations in good faith by way of security for debts previously contracted, where real estate is conveyed to them in satisfaction of debts previously contracted in due course of business, and where they buy real estate at sales under judgments, decrees or mortgages held by them, or purchase that kind of property to secure debts due to them. U. S. R. S., § 5137; *Heath* v. *Second Nat. Bank of Lafayette*, 70 Ind. 106; *ante* 406.

No objection is made to the validity of the junior mortgage taken by Boyd to secure a pre-existing debt due to the bank. The authority to take this junior mortgage being conceded, the right of acquiring such further interest in the mortgaged lands as was necessary for the protection of the security afforded by the junior mortgage appears to us to have followed as a necessary consequence.

No restriction is imposed upon a banking association in taking a mortgage to secure a debt previously contracted. When therefore a National bank takes a mortgage for such a purpose it becomes invested with all the rights which usually belong to a mortgagee. Among these is the right to protect itself, by all the usual business methods, against the disastrous consequences likely to

result from older liens upon the mortgaged property. *First N*
Bank v. *Nat. Exchange Bank*, 92 U. S. 122; 1 Nat. Bank C
124. We consequently know of no ground on which the auth
ity of Boyd to purchase the note and mortgage in suit for the
of the bank represented by him can be seriously question
Upton v. *Nat. Bank*, 120 Mass. 153; 1 Nat. Bank Cas. 6
Ornn v. *Merchants' Nat. Bank*, 16 Kans. 341; 1 Nat. Ba
Cas. 490; *Spafford* v. *First Nat. Bank*, 37 Iowa, 181; 18 A
Rep. 6; 1 Nat. Bank Cas. 486.

Furthermore, as has been seen, National banking associati
are expressly authorized to purchase real estate, which may
course include any interest in such property when necessary
secure debts already due them.

A contract for forbearance in suing upon a promissory note
other similar instrument in writing, after it has become a bind
obligation upon the makers, must be upon some new conside
tion. This rule applies not only to cases in which the rights
sureties are affected, but extends to all contracts of that charact
A distinct and adequate consideration is an essential requisite
all contracts of forbearance to sue. Chit. Cont. 289; 1 Pa
Cont. 440; 2 id. 26; *Abel* v. *Alexander*, 45 Ind. 523; 15 A
Rep. 270; *Buck* v. *Smiley*, 64 Ind. 431; *Starret* v. *Burkhal*
70 id. 285; *Lemmon* v. *Whitman*, 75 id. 318; 39 Am. Rep. 1

As the note was overdue when Mrs. Dutch paid $300 upon
as in full of interest due upon it up to the 1st day of Janua
1878, the appellants' claim, upon the authority of *Burns* v. *A*
derson, 68 Ind. 202; 34 Am. Rep. 250, that it was then drawi
only six per cent interest, and that consequently the amount
interest paid, and agreed to be paid, by Mrs. Dutch, being
excess of that rate of interest, constituted a sufficient conside
tion for the agreement to extend the time of payment of the no

At the time their brief was filed this claim of the appella
raised a question of some interest with reference to some of
decided cases, but since that time the case of *Burns* v. *And*
son, *supra*, relied upon has been overruled by the court, and
doctrine of the case of *Kilgore* v. *Powers*, 5 Blackf. 22, re
serted and re-established. The amount of interest which M
Dutch paid as well as agreed to pay was not for that reas

in excess of the lawful interest accruing and to accrue upon the note. *Shaw* v. *Rigly*, 84 Ind. 375; 43 Am. Rep. 96.

Neither the payment of interest already accrued nor a promise to pay such interest as may thereafter lawfully accrue upon a note, will afford a sufficient consideration for an agreement to extend the time of payment of the note. *Starret* v. *Burkhalter*, *supra*.

Mrs. Dutch neither paid nor agreed to pay a greater rate of interest than was specified in the note, and neither paid nor promised to pay any interest in advance. There was therefore no new consideration to support the agreement for the extension of time entered into with Ross. The agreement was in consequence ineffectual as a contract for forbearance, and inoperative for any other practical purpose.

The Circuit Court did not err in refusing to permit the agreement to be read in evidence. Other questions have been incidentally discussed by counsel but they are not presented in such manner as to require any decision upon them.

The judgment is affirmed, with costs.

Wasson v. First National Bank of Indianapolis.

(107 Ind. 206.)

Taxation — stock — deduction of debts — discrimination — judicial notice.

Where a tax law of a State allows tax payers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the State in the hands of its citizens, but denies to the owners of National bank stock the right to deduct their debts from the assessed value of such stock, it is an invalid discrimination under section 5219, United States Revised Statutes.

Courts will take judicial notice that the moneyed capital from which the tax payer may so deduct his debts is a material portion of the whole moneyed capital of the State. See 5 Am. St. Rep. 846, note.

FROM the Marion Superior Court.

W. W. Woollen, *S. Claypool*, *W. A. Ketcham* and *F. T. Hord*, Attorney-General, for appellant.

R. Hill, *R. N. Lamb*, *A. L. Mason*, *R. B. Duncan*, *J. Duncan*, *C. W. Smith*, *J. R. Wilson* and *W. H. H. Miller*, appellee.

ZOLLARS, J. It is well settled that this court will not gran rehearing upon grounds not urged in argument preceding the cisions. *Board, etc.* v. *Center Tp.*, 105 Ind. 422, and cases th cited.

The main question presented by the record in this case is important one. A rehearing was granted, and an oral argum solicited by the court upon that question.

It is now urged that the complaint is technically defecti These objections were not urged in argument prior to the form decision, and as a rehearing would not have been granted on count of them, we think that in this particular case they shou not enter into the decision. Without intending to commit t court in the way of a ruling, we may say in passing, that if were to write upon those questions, as at present advised, should feel constrained to hold that the objections are not w taken. If however appellant is correct in his contention he m make available what he now urges by way of an answer below.

The one important question presented by the record is this: the assessment and taxation of shares of National bank stock, a the owners thereof having no other credits or moneyed capital fro which to deduct their *bona fide* debts, entitled to deduct the from the assessed value of such shares of stock? The law this State provides that in the assessment and taxation of what the statute is denominated credits, the individual tax payer, owner thereof, may deduct therefrom his *bona fide* debts, exce debts of certain designated classes. R. S. 1881, §§ 6332, 633 6336.

The first question for decision is: From what credits ma such debts be deducted by the individual tax payer, and what do the word "credit" include?

The statute further provides that the assessor shall furnish the tax payer blanks upon which he shall furnish a list of h personal property of every description owned by him on the 1 day of April. R. S. 1881, § 6330.

So far as material here, section 6332 is as follows:

"In making out the statement, each person shall put down the credits due and owing from any person or corporation, whether in or out of the county, separately from the rest of his personal property; and every credit for a sum certain, payable either in money or labor, shall be valued at a fair cash value for the sum so payable; and if for any article of property, or for labor or for services of any kind, it shall be valued at the current price of such property, labor or services. In making up the amount of credits which any person is required to list, for himself or for any other person, company or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company or corporation to any other person, company or corporation, for a consideration received. * * * Nothing in this section shall be so construed as to authorize any deductions allowed by this section to be made from the value of any other item of taxation than credits. In making out the statement he shall also exhibit to the assessor, for the purposes of valuation, a list of all notes, drafts, mortgages and judgments held or owned by him; and he shall also, for the information of the assessor, furnish him with a list containing the number and amount of all United States and State bonds, and notes and other securities of the United States not taxable, held or owned by him on said first day of April."

The tax payer is not allowed to temporarily convert his property and money into non-taxable securities for the purpose of escaping taxation.

The above provision of the section is perhaps to insure good faith in that regard, by furnishing the assessor some data from which to determine as to whether or not the tax payer, by such conversion, has attempted to evade taxation. See also § 6335.

The list furnished to the tax payer has two columns in which to set down the value of the articles of personal property or credits, etc. In one of these the tax payer is required to set down the value, and the other is designed to be used by the assessor for a like purpose. If the value affixed by the tax payer is satisfactory to the assessor he may adopt it; if it is not, he may disregard it, and affix a valuation of his own.

It is required by the several sections of the statute, and especially by sections 6330 and 6336, that the tax payer shall put down upon the list furnished to him all of his personal property, including credits due to him, of every description.

In putting down "the credits due and owing," the tax payer is not required to itemize, but may put down the sum of them all, and his estimate of their value. In this he may be mistaken, or he may intentionally underestimate their value.

For the purpose of enabling the assessor to detect and corre the wrong, it is provided in the latter part of section 6332, *supr* that the tax payer shall exhibit to him a list of all notes, draft mortgages and judgments held or owned, etc. These are not be furnished for the purpose of being listed by the assessor, b for the purpose of valuation. Of course, if the owner has ne lected to list them, the assessor may do so, but the law conte plates a listing by the tax payer. This all shows that note drafts, mortgages and judgments are all credits within the mea ing of that section of the statute, and hence credits from whi the designated *bona fide* debts may be deducted by the tax paye This, it seems to us, must be plain. The statute also provid the form of the schedule to be furnished by the assessor to t tax payer. § 6336. That schedule is full and specific, and w intended to, and does provide in detail the place and manner listing for taxation all articles and items of personal property, i cluding moneyed capital and credits of every description. The are to be put down opposite to numbers. The first five numbe or items are as follows:

"1. Money on hand, or on deposit within or without this State, subject my order, check or draft.

"2. All moneys loaned by me, either on time or on call.

"3. All bonds belonging to me or in which I have any interest, issued bodies corporate, either within or without this State.

"4. All bonds belonging to me or in which I have any interest, issued public corporations, including State, county, city, town and all other bonds this class.

"5. All shares of stock in any corporation formed outside of this State; a also all shares of stock in any corporation formed in this State, and conductin its business outside of this State."

From the above items the schedule makes no provision for d ducting the designated *bona fide* debts of the tax payers. It wi be observed also that the above items do not include the "cre its" mentioned in section 6332, *supra;* nor do they inclu "money at interest," except as that may be included in and meaning the same as money loaned.

The only other number or item in the schedule material he is number or item 82, at the close of the schedule, which is follows:

"82. CREDITS (by which is meant whatever is due to the party from any other person, company or corporation, in the shape of labor, property or money) amounting to..... .....$.... ....
Less my *bona fide* indebtedness (substracted from the credits)..$.... ....
Leaving a residue of credits, amounting to.....$.. ...."

This item in the schedule is in perfect harmony with our construction of section 6332, *supra*, and embraces the same kind of credits, and none other, from which the *bona fide* debts may be deducted. It does not include the first two items in the schedule, money on hand or on deposit, and money loaned on time or on call, nor does it include the items of bonds and stocks. It therefore includes notes, drafts, mortgages and judgments held or owned by tax payers, except they are to secure money loaned; amounts due them for goods and various manufactured articles sold at wholesale or retail; for materials furnished; for work and labor; for professional services; amounts due upon public improvements; on account of lands sold, and all other credits of every description, due from any person, company or corporation, in the shape of labor, property or money, except amounts due on loans on time or on call. And this is so whether the notes, mortgages, judgments and the other items of indebtedness draw interest or not. Judgments draw interest under the provisions of our law. As a usual thing, notes and mortgages draw interest, and so, as a general thing, other accounts for goods, raw material and manufactured articles sold, draw interest after the expiration of stated periods of credit. The fact then that the credits may draw interest makes no difference under the schedule and section 6332, *supra*.

Section 6333, at first blush, seems to be in conflict with the above sections as we construe them. That section is by way of a limitation upon deductions to be made by the tax payer. It provides that "No person, company or corporation shall be entitled to any deduction from the amount of any bonds, stocks, money loaned or money at interest," etc. If "money at interest," as used in the section, means any thing different from "money

loaned," if, in other words, it means that because accounts, no judgments, etc., may draw interest, they are "money at intere then clearly the section, that far, is in conflict with the sched and section 6332, *supra*.

It is a settled rule that in the construction of a statute, all of various sections and provisions must be construed together, so to ascertain the intention of the law-makers, and make the stat in all its parts consistent as a whole. Thus construing the statu we have no doubt that "money at interest" was used as the equi lent of "money loaned." In ordinary parlance, "money at terest" has reference more to money loaned than to interest-be ing notes and accounts received for property sold.

Section 6273, in giving a definition of the terms "personal tate" and "personal property," as used in the act, provides t they shall include, among other things, all rights, credits, cho in action, all bonds and stocks, all money at interest and all oth credits and investments. Here evidently the term "money interest" does not mean accounts and choses in action draw interest, but money loaned. In section 6286, the term "mon loaned" is used, and not the term "money at interest." Th the terms "money loaned" and "money at interest" seem to used in the act as convertible terms. If however there we an irreconcilable conflict between sections 6332 and 6336 whi provides the schedule, the latter must govern.

The schedule is the summing up and putting in shape for pra tical use what is provided in the preceding sections. The schedu has heretofore been regarded as controlling. It was so regard under the Tax Law of 1852, as amended in 1869. *Clark* v. *Cart* 40 Ind. 190. It was so under the Tax Law of 1872. *Matter Campbell*, 71 Ind. 512. It may be observed in passing that t act of 1872 is materially different from the act of 1881. And the Supreme Court of the United States, in construing the T Law of 1872, placed its decision upon the schedule. *Evansvi Bank* v. *Britton*, 105 U. S. 322; *ante* 48.

Upon an examination of the whole statute, we are clearly the opinion that the individual tax payer may deduct his *bona fi* debts, of the class designated in the act, from all his moneye capital and credits, except from the classes specified in the fir

five items of the schedule as above set out, viz., money on hand or on deposit, money loaned, bonds and shares of stock in corporations.

The National Bank Act provides that the shares of stock in National banks may be subjected to taxation under the laws of the State, with other personal property —

"Subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." U. S. R. S., § 5219.

The limitations upon the taxation of shares of National bank stock imposed by the above section are imposed in almost the same language by our statute. R. S. 1881, §§ 6306, 6307.

It has been many times held by the Supreme Court of the United States that the authority of the States to tax the shares of National bank stock is derived wholly from the above act of Congress, and that without the consent of Congress these bank stock shares could not be taxed by State authorities at all. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of United States*, 9 id. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57.

The authority and privilege of course must be exercised under the limitations and restrictions imposed. The controlling questions then are, what are the limitations and restrictions imposed? What is the "moneyed capital," as used in the act?

Were we at liberty to place our own construction upon the act, we should be very strongly inclined to hold that "moneyed capital," as therein used, has reference to capital invested as an investment for profit, whether in bonds, stocks, money loaned or otherwise, and not to debts due the tax payer growing out of the ordinary affairs of business life. Such substantially is the dissenting opinion of Chief Justice WAITE, concurred in by Justice GRAY in the case of *Evansville Bank* v. *Britton*, *supra*. The court in that case however adopted a different construction, and it is the duty of this court, as it is the duty of all State courts, to follow the construction placed upon the act by that court.

The above case arose under our Assessment Law of 1872, a
the questions were what is meant by "moneyed capital," as us
in the above act of Congress, and whether the owner of Natio
bank stock having the designated *bona fide* debts, might dedu
them from the assessed value of the shares of stock? It w
held that he could, and that "moneyed capital" includes not on
bonds, stocks and money loaned, but all credits and demands
every character in favor of the tax payer.

Mr. Justice MILLER speaking for the court in stating and
ciding the case, said:

"The objection made to the Indiana statute is the same as th
made against the New York statute, namely, that it permits the t
payer to deduct from the sum of his credits, money at interest
other demands, the amount of his *bona fide* indebtedness, leavi
the remainder as the sum to be taxed, while it denies the sa
right of deduction from the cash value of bank shares.

"A distinction is attempted to be drawn between the India
statute and the New York statute, because the former permitt
the deduction of the tax payer's indebtedness to be made from t
valuation of his personal property, while in Indiana he can on
deduct it from his credits. And undoubtedly there is such a di
ference in the laws of the two States. But if one of them
more directly in conflict with the act of Congress than the othe
it is the Indiana statute. In its schedule the subject of taxatio
from which the tax payer may deduct his *bona fide* indebtedne
is placed under two heads, as follows:

"'1. Credits or money at interest, either within or witho
the State, at par value.

"'2. All other demands against persons or bodies corporat
either within or without this State.

"'Total amount of all credits.'

"The act of Congress does not make the tax on personal prop
erty the measure of the tax on bank shares in the State, but th
tax on moneyed capital in the hands of individual citizens. Cred
its, money loaned at interest, and demands against persons o
corporations are more purely representative of moneyed capita
than personal property, so far as they can be said to differ.

"Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.

"It is unnecessary to repeat the argument in *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57, on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholders to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

In the late case of *Boyer* v. *Boyer*, 113 U. S. 689; *ante* 151, Mr. Justice HARLAN reviewed the cases, and from them deduced certain rules for the construction of the above section of the National Bank Act, the second of which is as follows:

"That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than National bank shares, or which permits the tax payer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."

There can be no doubt that under these decisions, all credits of whatever nature, which include the credits from which the tax payer may deduct his *bona fide* debts, as here decided, whether interest-bearing or not, are moneyed capital in the sense in which that term is used in the act. And under these decisions also, statutes which allow the tax payer to deduct his debts from such moneyed capital, and deny this right to the holders of shares of National bank stock, must yield to the paramount act of Congress, which inhibits such discrimination.

But what shall be said, when the tax payer is allowed to deduct his debts from but a part of his moneyed capital, as here held, from his money capital, other than bonds, money loaned and

shares or stock? The act of Congress, as it has been held, d not require absolute equality, as that is difficult, if not impo ble, of attainment. The cases hold however that the intent of Congress in the enactment of the statute was not to permit substantial discrimination in favor of moneyed capital in hands of the tax payer, as against capital invested in shares of tional bank stock. *Boyer* v. *Boyer, supra.*

In that case, at page 693, in speaking of the case of *Hepb* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113, H LAN, J., said: "That case is authority for the proposition tha partial exemption by a State, for local purposes, of mone capital in the hands of individual citizens does not, of itself without reference to the aggregate amount of moneyed cap not so exempted, establish the right to a similar exemption favor of National bank shares held by persons within the sa jurisdiction. But it is by no means an authority for the br proposition that National bank shares may be subjected to lo taxation where a very material part, relatively, of other mone capital in the hands of individual citizens, within the same ju diction or taxing district, is exempted from such taxatio Again, at page 695, in speaking of the cases generally, it said: "These decisions show that in whatever form the qu tion has arisen, this court has steadily kept in view the intent of Congress not to permit any substantial discrimination in fa of moneyed capital in the hands of individual citizens, as agai capital invested in the shares of National banks." And still f ther, at page 701: "But as substantial equality is attainab and is required by the supreme law of the land, in respect State taxation of National bank shares, when the inequality is palpable as to show that the discrimination against capital invest in such shares is serious, the courts have no discretion but to terfere."

In that case the State of Pennsylvania had exempted from lo taxation, for county purposes, mortgages, judgments, etc., a imposed such local taxes upon the shares of National bank sto It was held that the result was a material inequality, and that t bank stock could not be taxed for such local purposes. See a *First National Bank* v. *Treasurer of Lucas Co.*, 25 Fed. Re

49 (U. S. Cir. Ct., N. D. Ohio); *Ruggles* v. *City of Fond du Lac*, 53 Wis. 436.

The California statute, as in force in 1880, provided that "In assessing solvent debts not secured by mortgage or trust deed, a deduction therefrom shall be made of debts due to *bona fide* residents of the State," but did not allow a like reduction from the assessed value of National bank stock. It will be observed that the statute, like ours, does not allow such deduction from all moneyed capital.

In the case of *Miller* v. *Heilbron*, 58 Cal. 133; *ante* 330; after quoting from the opinion in the case of *People* v. *Weaver*, 100 U. S. 543; 2 Nat. Bank Cas. 57, which involved a statute of New York allowing a deduction of debts from the value of all personal property, except from shares of National or State banks, it was said: "So far as the immediate question is concerned, there is but one difference between the law of New York and the law of this State — a difference of degree." It was held that so far as the State statute denied the deductions to the holders of National bank stock, it was in conflict with the act of Congress.

The holding of the above cases is, that the Taxing Laws of States cannot be upheld, as against the act of Congress, so far as they may discriminate against National bank stock, by directly exempting a portion of other moneyed capital from taxation, or by doing the same thing in allowing a deduction of debts from the assessed value of a portion of other moneyed capital, and denies the same deduction to the holders of National bank stock, when such discrimination is so palpable as to show that it is material and serious, and that when such is the case, the holders of shares of National bank stock will be allowed to deduct their debts, the same as the owners of the other moneyed capital. Our statute makes no provision for deducting debts from the assessed value of shares of National bank stock, but as we have seen, allows such deduction from a portion of other moneyed capital, and thus discriminates against National bank stock. Is that discrimination so material and serious that the owners of such shares of stock are entitled to deduct their debts, notwithstanding the statute? That depends upon the amount of the moneyed capital from which the debts of the tax payer may be

deducted, as compared with the whole of the moneyed capita the State. This case comes here upon a demurrer to appell complaint for an injunction. Unless the court may take judi notice of the fact that the moneyed capital from which the payer may deduct his debts as here decided, is a material port of the whole moneyed capital of the State, the complaint is tally defective, because it contains no averment as to that fac

Our statute provides that matters of which judicial notic taken need not be stated in a pleading. R. S. 1881, § 3 May the court take judicial notice of that fact? As we h seen, for the purposes of taxation in the hands of the tax p ers, the whole of the moneyed capital of the State, as speci in the schedule provided by the Tax Law, consists of money hand or on deposit within or without the State, money loan bonds issued by bodies corporate, bonds issued by public porations, and shares of stock in corporations, which inclu shares of bank stock. For convenience, these several items m be regarded as constituting the first division of the mone capital of the State. From the assessed value of none of th can the debts of the tax payer be deducted.

Another division includes all other moneyed capital of State, the items of which consist, as we have also seen, notes, mortgages and judgments, except for money loan amounts due for goods, wares and merchandise of all kin raw material, farming implements, machinery and manufactu articles of all kinds, sold at wholesale or retail, amounts for labor and professional services, amounts due upon pub improvements, on account of sales of real estate, live sto and farm products, and all other credits of every descript due from any person, company or corporation, whether drawi interest or not, except as included in the first division abo These several items, from the assessed value of which de may be deducted, may be regarded as constituting the seco division of the moneyed capital of the State.

That the second division constitutes a very large and mater part of the credits in the business of the State, and thus a ve large and material part of the whole moneyed capital of the Sta is a matter of such common knowledge as to be known to t

ourts. There are many things of which the courts must take udicial notice. For example, they take judicial notice of the easons and the general course of agriculture. *Abel* v. *Alexander*, 45 Ind. 523; 15 Am. Rep. 270; *Tomlinson* v. *Greenfield*, 1 Ark. 557. That whisky, beer and gin are intoxicating. *Myers* . *State*, 93 Ind. 251; *Egan* v. *State*, 53 id. 162. That ale is nalt liquor. *Wiles* v. *State*, 33 Ind. 206. Of the time it takes o go from one city to another. *Fitzpatrick* v. *Papa*, 89 Ind. 7. See also *Pearce* v. *Langfit*, 101 Penn. St. 507; 47 Am. Rep. 37. Of the geography of the country, and that a point on a ailroad, one mile from Rosedale, is in Park county. *Terre Haute, etc., R. Co.* v. *Pierce*, 95 Ind. 496. Of the population f towns and cities. *Kalbrier* v. *Leonard*, 34 Ind. 497. Of the neaning of C. O. D. *United States Ex. Co.* v. *Keefer*, 59 Ind. 263. Of the meaning of S. E. ¼ of N. W. ¼, sec. 18, T. 21 N., R. 7 E., forty acres. *Jordan Ditching, etc., Ass'n* v. *Wagoner*, 33 Ind. 50; *Frazer* v. *State, etc.*, 106 id. 471. That the use of farm in summer is worth more than in winter. *Ross* v. *Boswell*, 60 Ind. 235. Of the duties and powers of cashiers of banks. *Farmers, etc., Bank* v. *Troy City Bank*, 1 Doug. (Mich.) 457; *La Rose* v. *Logansport Nat. Bank*, 102 Ind. 332; *Sturges* v. *Bank of Circleville*, 11 Ohio St. 153. Of the facilities of travel between different points. *Hipes* v. *Cochran*, 13 Ind. 175; *Manning* v. *Gasharie*, 27 id. 399. Of the fact that there are classes of notes and bills other than bank bills in circulation in this State as money. *Hart* v. *State*, 55 Ind. 599. Of the general pecuniary condition of the country as a part of the history of the times. *Ashley* v. *Martin*, 50 Ala. 537. Of the division of the Methodist Church into the Methodist Church North and the Methodist Church South. *Humphrey* v. *Burnside*, 4 Bush (Ky.), 215 (225). That ice-cream freezers had been in use before the invention for freezing dead bodies or fish. *Brown* v. *Piper*, 91 U. S. 37, 42; *Terhune* v. *Phillips*, 99 id. 592; *King* v. *Gallun*, 109 id. 99.

The courts of the State are bound to take notice, from its general history, that "during and since the war of the Rebellion the Adjutant-General of this State has made records of the muster-rolls of the different regiments of volunteers furnished by this State in the military service of the United States." *Board,*

etc., v. *May*, 67 Ind. 562. Upon the general subject of ju
cial knowlege, see Buskirk Pr. 15 *et seq.*, and cases there cited.

Mr. Greenleaf, says: "In fine, courts will generally take not
of whatever ought to be generally known within the limits
their jurisdiction." 1 Greenl. Ev., § 6, pp. 12, 13; *Brown*
Piper, *supra*

In speaking of what courts will take judicial notice, it was s
in the case of *Ho Ah Kow* v. *Nunan*, 5 Sawy. (U. S. Cir.
Dist. Cal.) 552 (560): "Besides, we cannot shut our eyes to m
ters of public notoriety and general cognizance. When we ta
our seats on the bench we are not struck with blindness, a
forbidden to know as judges what we see as men."

To hold in the case before us, that it was necessary to aver a
prove that the above second division of the moneyed capital c
stitutes a large and material part of the whole moneyed capital
the State, would be to hold that the courts cannot know ju
cially what must be known to the mass of the people, and wh
any intelligent person would be reluctant, if not ashamed, to c
fess he does not know.

To say that from this division of the moneyed capital, the t
payer may deduct his debts, and that the holders of shares
National bank stock, having no other credits from which to
duct their debts, may not deduct them from the assessed value
such shares of stock, would be to establish such an inequality a
discrimination against capital invested in such shares of stock,
the act of Congress, with the interpretations given to it by t
Supreme Court of the United States, will not tolerate.

The statutory privilege to tax payers, of deducting their del
from the above second division of moneyed capital, is practica
to relieve the most, if not the whole, of that capital from tax
tion, and leave the burdens to rest upon other property, includi
other moneyed capital. A tax payer having that kind of money
capital may have a deduction of his debts from the assessed val
thereof; while another, not having such capital but havi
money on hand or on deposit, money loaned, and bonds a
stocks (other than shares of National bank stock) may not ha
such a deduction. If there is any inequality or wrong in that,
between citizen tax payers, it is a matter wholly for the Legislatu

The holders of shares of National bank stock are upon an equality with tax payers having money capital of the second division above, and if, as between such holders and tax payers owning moneyed capital of the first, and not of the second division above, there is an inequality, it is a matter for the Legislature and for Congress.

The Legislature may so shape the State laws as to result in this inequality. Against such legislation, there is no inhibition in the National Bank Act. Possibly, the Legislature might avoid this inequality, if it be such, by providing that tax payers, not having shares of National bank stock, may deduct their debts from all or a certain proportion of their moneyed capital, and giving the same right to holders of shares of National bank stock to deduct their debts from a like proportion of their moneyed capital. Possibly, Congress might amend the National Bank Act to advantage. Doubtless, many holders of shares of National bank stock may have moneyed capital of the second division alone, and if so, they may deduct their debts from its assessed value, and thus the privilege of deducting their debts from the shares of stock in such cases can injure no one, as the debts can be deducted but once. That shares of National bank stock are taxed by State authority at all is a matter of grace or license, and not of right. So the Supreme Court of the United States holds. The States therefore must tax shares of stock in accordance with that license.

After a thorough re-examination of the question involved, we are constrained to hold that under the averments of the complaint, the stockholders therein named are entitled to deduct their just debts from the assessed value of their shares of National bank stock.

It has been suggested, in argument, that we ought, if possible, to rule otherwise, in order that the case might go upon appeal to the Supreme Court of the United States for a decision by that tribunal. We should be glad to have the case thus appealed, but we could not make a different ruling without disregarding our deliberate judgment, and placing this court, as we think, in an attitude of insubordination and hostility to the Supreme Court of the United States. It is the province of that court to interpret the

acts of Congress, and the duty of the State courts to adopt a
follow such interpretation.

The court below, at Special Term, sustained a demurrer to t
complaint. That ruling was reversed at General Term.

The judgment at General Term is affirmed, at appellant's co

ELLIOTT, J., took no part.

McCANN v. FIRST NATIONAL BANK OF JEFFERSONVILLE.*

(112 Ind. 354.)

Reduction of capital — surrender of stock — rights of stockholders.

The capital of a National bank having become impaired by the non-payme of the interest on some paper among its assets, to the amount of $71,000, order to avoid an assessment by the Comptroller the stockholders reduc its capital stock, and carried the bills and notes to the account of suspend or "bad debts," which were not thereafter included as assets, although tained in its custody. Some years afterward the bank realized $75,000, fr collaterals pledged for the security of that paper. In a suit by a stockhold to recover his share of the amount realized, proportioned to the amou of stock surrendered, *held*, that he could not recover.

APPEAL from Circuit Court, Clark county.

Howard, Reed & Stannard and *A. Dowling* for appellant.

J. K. Marsh and *Brown, Humphries & Davis*, for appelle

MITCHELL, C. J. The First National Bank of Jeffersonvil was organized some time prior to the 17th day of August, 187 in pursuance of the act of Congress which provides for the o ganization, and prescribes rules for the regulation and governme of National banking associations. The bank had at the da mentioned a paid-up capital of $300,000, of which Michael V McCann owned seventy-seven shares of $100 each. Owing the fact that there were among its assets about $71,000 of bil

*To same effect, Wools v. First Nat. Bk. of Jeffersonville, 112 Ind. 600.

and notes of the Ohio Falls Car and Locomotive Company, on which the interest had remained past due and unpaid for more than six months, and which were not well secured, and in process of collection, the capital of the bank had become impaired, and the Comptroller of the Currency had given notice, and was about to assess the stock to the amount of $75,000 in order to make good the deficiency, according to the requirements of Revised Statutes of the United States, section 5205. The stockholders thereupon, on due consideration, resolved to avail themselves of the privilege conferred by Revised Statutes of the United States, sections 5143 and 5204, in pursuance of which by the required vote they reduced the capital stock of the bank from $300,000 to $225,000. There being at the time little or no prospect that the bills and notes of the car and locomotive company would ever become collectible, they were presumably carried to the account of suspended or "bad debts," and were not thereafter included in the reports made to the Comptroller, as assets of the bank, although they were retained in its custody. Some time in the year 1882, the bank realized about $75,000 from certain collaterals which had been pledged as security for the bills and notes hereinabove mentioned. The same was carried into the account, and treated as assets of the bank. McCann, after having with the other stockholders of the bank, surrendered an amount of his stock proportioned to the reduction made in 1876, commenced suit in May, 1885, for the purpose of compelling the bank to distribute to him a share of the $75,000 realized as above, proportioned to the amount of stock surrendered. The question is, whether upon the facts stated, the bank can be compelled at the suit of a stockholder, to distribute the money realized from the collection of the suspended bills and notes.

An examination of the act of Congress makes it clear that a National banking association may, within limits, reduce its capital stock. This is provided for in express terms by section 5143, which enacts generally that shareholders owning two-thirds of the stock may reduce the capital stock of the bank to any amount not less than the minimum required by the act, nor than the amount required for the outstanding circulation of the bank, upon the approval of the Comptroller. Section 5204, after providing

that "no association, nor any member thereof, shall, during time it shall continue its banking operations, withdraw or pe to be withdrawn, either in the form of dividends or otherw any portion of its capital," and after prohibiting the makin dividends in case losses have been sustained, which exceed the divided net profits then on hand, deducting from such profit losses and bad debts, as bad debts are therein defined, conclud follows: "But nothing in this section shall prevent the reduc of the capital stock of the association under section 5143." Sec 5205 makes provision for enforcing the payment of the cap stock, in case the capital stock has not been paid in, and also prov for assessments upon the shareholders to make good any deficie in case the capital stock becomes impaired by losses or otherw and makes provision for forcing the association into liquidatio the event of failure to pay in the capital stock, or in case the sh holders neglect or refuse to pay up assessments which have b made in order to make good deficiencies which may have resu from losses or otherwise.

It becomes apparent upon looking into the act of Congress der which National banking associations are organized, and wh regulates the conduct of their business, that shareholders own the requisite amount of stock in such an association may red the amount of the capital voluntarily, for the purpose, as it w of producing a surplus for withdrawal and distribution, or t may be constrained to a reduction of the capital, rather than s mit to assessments on their stock, so as to make good deficien occasioned by losses or otherwise. The intent and purpose of act plainly is that in no contingency shall the amount of the cap stock exceed its actual value, taking into account the live as and condition of the bank. In other words, the amount of capital must be "in line" with its value, and this uniformity n be procured, either by a reduction of the amount to any point below the minimum required, or by assessing the stock, in case loss or impairment, so as to make the actual value corresp uniformly with the amount of the capital stock.

The case under consideration proceeds upon the theory that stockholders became the owners of the bills and notes, the susp sion of which occasioned the reduction of the capital, because th

surrendered an amount of their stock sufficient to restore the equilibrium, so to speak, between the amount and value of the capital of the bank It is assumed that if the shareholders had reduced their capital without constraint, for the purpose merely of withdrawing the excess of capital above the amount to which it was reduced, that the excess would necessarily have been distributable among the shareholders. It is from this premise that the conclusion is drawn that the bank became liable to distribute the $75,000 collected in the manner hereinabove stated. In support of this conclusion, *Seeley* v. *Bank*, 8 Daly, 400; 1 Nat. Bank Cas. 804, is cited. That was a case in which stockholders of a bank, representing two-thirds of its stock, reduced the capital of the bank, with the approval of the Comptroller, from $500,000 to $300,000. The directors resolved to distribute $100,000 among the stockholders, and to retain $100,000 as a surplus fund, to be used in the business of the bank. One of the stockholders, who refused to surrender any part of his stock, commenced suit, and the court held that the bank was bound to pay the whole of the $200,000 which resulted from the reduction to the stockholders. Stress seemed to be laid upon the fact that it appeared in that case that there had been no impairment of the capital of the bank. The reduction was assimilated to the winding up of the bank *pro tanto*.

There is certainly no express provision in the law authorizing the withdrawal and distribution of any part of the capital stock of a banking association prior to the final winding up of the bank. On the contrary, as has already been seen, section 5204 in terms prohibits any association, or member thereof, from withdrawing, or permitting to be withdrawn, any portion of its capital stock during the time the bank continues its banking operations. Notwithstanding this prohibition, it may well be, in case a banking association should find itself unable to employ the whole of the capital originally embarked in the enterprise, and should for that reason determine upon and actually effect an authorized reduction, that the excess would in that event be liberated, and cease thereafter to be a part of its capital stock. In such a case the excess could well be said to have accomplished its mission as bank capital, and, like a dividend duly declared, could not be carried to the surplus fund of the bank, and be divested from the stock-

holders without their consent. Having reduced its capital u the sole pretext that it could not find employment for the exc the bank would not for obvious reasons be heard to say, after the duction had been allowed and made, that it would retain the mo for use in its business. Such a reduction would proceed upon implied understanding that the stockholders should have, as a sideration for the surrender of a portion of their stock, a *pro r* distribution of the excess. To refuse to distribute the ex above what was required to maintain the reduced stock at its value would, in such a case, be in the nature of a fraud upon stockholders. "But it is not the rule that the reduction o capital stock of a corporation always authorizes the distribut among the stockholders of the difference between the original the reduced amount of capital. Such a distribution is only l ful when it appears that the original capital stock is unimpaire Cook Stock and Stockholders, §§ 289–537.

In the present case, the reduction was not made to effect a tribution of a portion of the accumulated surplus or unemplo capital of the bank. The original capital had become impai by reason of "bad debts," and the stockholders were in the sit tion of being compelled to elect either to submit to an assessm of their stock, or go into liquidation, or reduce the capital of bank, so as to put the amount of the capital in correspondei with its value. They chose the latter alternative. Rather th submit to an assessment of their stock, so as to make good the ficiency, each stockholder surrendered a proportionate share of stock, and by that means they secured the privilege of continui the business of the bank with a reduced capital. The appella as appears from his complaint, surrendered his proportion, rece ing as a consideration therefor immunity from the impending sessment, and the privilege of holding the residue of his stock a continuing association. This was all the consideration he c templated, and that was implied in the transaction. *Delano Butler*, 118 U. S. 634; 7 Sup. Ct. Rep. 39; *ante* 163. Havi received the whole consideration upon which the surrender w made, the stockholders could not afterward recover more, simp because the bank succeeded in realizing upon the suspended bi and notes, the suspension of which occasioned the reduction.

the stockholders had submitted to the proposed assessment of their stock, and paid in the $75,000, instead of reducing the capital stock, it would hardly be claimed that they would have become entitled to take or receive from the bank an equal amount of its suspended assets. Nor can we perceive any reason why they should have become entitled to them, because they elected to reduce the capital stock. Corporations have no implied power to enlarge or diminish their capital, or to distribute among shareholders any part of the fund which constitutes capital stock prior to the winding up of the corporation. *Sutherland* v. *Olcott*, 95 N. Y. 93. Persons who invest moneyed capital in National banking associations must look to the act of Congress to which such associations owe their existence, and which regulates their conduct, for authority to demand the return to them of any part of the capital invested, or to receive gains in the shape of dividends therefrom. Section 5143, under which the reduction was authorized, required the bank to obtain the approval of the Comptroller of the Currency to the proposed reduction of its capital, and the proceedings for diminishing its capital stock ended with the approval so obtained. The capital of the bank as reduced, and the assets then held by the association, constituted a trust fund upon the faith of which it was authorized to proceed with its business. The directors of the bank had no authority thereafter to permit its capital stock or assets to be further depleted by distributions, in one way or the other, of bills or notes among its shareholders. *In re Banking Co.*, 21 Ch. Div. 519. The bank held its suspended bills under the same authority, and charged with like obligations in respect thereto, as measured its rights and duties in respect to other assets. It could only distribute its surplus money when it accumulated in the course of its business, and its right to distribute would depend upon an examination into the condition and affairs of the bank at that time. *Strong* v. *Railroad Co.*, 93 N. Y. 426. The right of the shareholders to compel a distribution growing out of the reduction was fixed by the condition of the bank as it existed when the reduction was made, and are not to be determined in the light of subsequent events. If a distribution had been authorized and made in good faith, it is settled that the stockholders could not have been compelled to

refund because of subsequent losses, even though the losses w caused by the suspension of bills and notes held by the bank the time the distribution was made. *Main* v. *Mills*, 6 Biss. *Reid* v. *Manufacturing Co.*, 40 Ga. 98. For the same rea the bank cannot now be compelled to distribute because of su quent events. Upon any view of the case, the ruling of learned judge at the circuit was right.

Judgment affirmed, with costs.

Howk, J., took no part.

Ellis v. Little.

(27 Kans. 707; 41 Am. Rep. 434.)

Receivers — powers of.

The receiver of a National bank, directed to sell the assets on such terms in such manner as he deems best for the interest of all concerned, has power to exchange, barter or trade the assets.

Action on contract. The opinion states the case. T plaintiff had judgment and appealed.

H. G. Ruggles, for plaintiff in error.

Sloss & Hatton, for defendant in error.

Horton, C. J. The principal question in this case is, whetl the estate of the bank can be charged with the damages resulti to Ellis, plaintiff in error, from the failure and inability of t receiver of the bank to comply with the terms of the contr executed December 31, 1877. If the receiver exceeded his a thority in executing the contract, plaintiff in error was not entitl to recover in the court below and therefore cannot complain th the trial court erred in the amount for which it rendered jud ment in his favor. The act of Congress, as embraced in t United States Revised Statutes of 1873–74, to provide a Nation currency, etc., and which establishes those associations for the c

rying on the business of banking now known as our National banks, provides in section 5234 as follows:

"On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the directions of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

In accordance with this section H. B. Cullum was appointed receiver of the bank October 19, 1876, about fourteen months prior to the execution by him of the contract sued on. On the 9th day of January, 1877, said receiver filed in the District Court of the United States for the District of Kansas his petition praying for an order of the court authorizing him as such receiver to sell certain real estate, bills receivable, overdrafts and other property that were mentioned and described in a certain schedule marked "Exhibit B," and attached to his petition. Among other things in said schedule B, under the head of real estate, were the following:

"One-third interest in a flouring mill in Wichita, Sedgwick county, Kansas, (incumbered $961,) part of J. C. Fraker's transfer, $3,500."

In said schedule there was also mentioned one judgment in favor of the said H. B. Cullum as receiver of the First National Bank of Wichita, Kansas, rendered in the District Court of the United States in and for the District of Kansas against Thomas & Wheeler, for the sum of $983.63 with twelve per cent interest, and a judgment on a note of J. Hanson, in the District Court of the United States for the District of Kansas, for the sum of $909.25, with twelve per cent interest; one claim for attorney's fees in favor of Ruggles & Sterry, and against Thomas & Wheeler for $100 assigned to said receiver; also a claim for an overdraft against Thomas, Wheeler

& Co. in favor of said bank, for the sum of $56.44. Upon c
sideration of this petition the receiver was allowed and permit
by the court "to sell each and every item of personal prope
and real estate mentioned and described in schedule B attach
to his petition, on such terms and in such manner as in his ju
ment may be for the best interests of the creditors and all int
ested in said bank and its assets." On the 8th day of Novemb
1876, J. C. Fraker assigned and transferred to Cullum an inter
in a judgment rendered in the foreclosure of a mortgage up
real estate in Union county, in the State of Iowa, in his fa
against one William Groesbeck, for the sum of $5,960, to secu
and pay about $2,300 due the bank upon notes held by it execut
by W. A. Thomas & Co. On November 13, 1876, the recei
bid in the mortgaged premises at sheriff's sale, and on the 28th d
of November, 1877, a sheriff's deed was executed to the recei
of the mortgaged premises. The consideration that Ellis agre
to pay to the receiver upon the contract sued on was $5,5
Two thousand dollars was to be paid and satisfied as follow
Ellis was to procure an assignment from S. B. Thomas a
E. A. Ellis to Cullum of $2,000 in the said judgment render
in the foreclosure suit in Union county, Iowa, against t
said William Groesbeck, in favor of J. C. Fraker, which assig
ment of $2,000 in said jugdment the said Cullum agreed to
ceive as a payment of $2,000 upon the contract. The balance
the consideration, to-wit, $3,500, was to be paid upon the 1st d
of May, 1878. When S. B. Thomas and E. A. Ellis came to
sign their interest in said judgment, it turned out that they own
$3,462.63 therein, and on the 2d day of January, 1878, they
signed all of their interest in said judgment to Cullum, as
ceiver of the bank, and he receipted on the contract as follow

"Received, January 2, 1878, of N. W. Ellis, an assignment of the Io
judgment, by W. A. Thomas and Samantha B. Thomas, and Emma A. El
amounting to $3,462.63, it being in full of the $2,000 payment mention
within, and the balance, $1,462.63, to apply in part payment due May 1, 18
"H. B. CULLUM,
"*Receiver of the First National Bank of Wichita, Kansas.*"

It does not appear that the Iowa judgment, or the judgme
rendered in the District Court of Sedgwick county on May 2
1877, on the note of W. L. Fraker for $965.90, was mentioned

referred to in the petition filed by the receiver in the United States District Court; and it is not claimed that any specific order was made by the United States court permitting the receiver to exchange, trade or barter the property of the bank for other or different property. The power conferred upon the receiver by the court authorized him to sell the personal property and real estate described in the schedule attached to his petition filed in the court, on such terms and in such manner as in his judgment was for the best interests of the creditors and all interested in the bank and its assets. This — nothing more. The receiver of a National bank, appointed by the Comptroller under the section of the act of Congress quoted, is the agent of the United States, and is limited as to his functions by the object of the receivership and the duties which it involves. High Receivers, § 360; *Kennedy* v. *Gibson*, 8 Wall. 498; 1 Nat. Bank Cas. 17.

Under the order of the court, such receiver may sell the real and personal property of the bank on such terms as the court shall direct, but he cannot sell in the absence of such an order, nor sell upon terms in conflict with the order. As the receiver in this case did not apply for an order to sell or dispose of the judgment on W. L. Fraker's notes, supposed to amount to over $900, any attempted sale thereof, or any agreement concerning a sale of it, was in excess of his power as receiver, and therefore not binding upon the estate of the bank. Without the order of the court, the receiver had no authority in his official capacity to buy the Iowa judgment or any interest therein, nor could he under the order of the court permitting him to sell the property of the bank, exchange, trade or barter it for other property. Nor could such receiver charge the estate of the bank by any executory contract of his unless he was authorized so to do by the provisions of the National Banking Act and the order of a court of competent jurisdiction obtained under the terms of said act. No application was made by the receiver to the court for permission to execute an agreement of the character of the one sued upon; therefore in the absence of such an order the estate cannot be charged for damages resulting from the failure or inability of the receiver to convey or deliver property not belonging to the bank, nor for his refusal to comply with covenants which he was with-

out power as the receiver to make. As the power of a receiv of a National bank appointed by the Comptroller is limited person dealing with him in his official capacity is bound as a m ter of law to have knowledge of his authority to act, and if co tracts and agreements are entered into with the receiver in exc of his authority as conferred by law, the parties contract at th own peril, and the estate of the bank cannot be charged for t default or inability of a receiver acting outside of his functions receiver and beyond the duties which it involves.

In answer to the point that the receiver exceeded his powe and that his action did not bind the estate, counsel for plaint refers to several decisions; yet none of these are strictly appli ble. *Livingston* v. *Pettigrew*, 7 Lans. 405, was an action make a receiver liable personally, on his covenant that certa judgments and claims assigned by him were due and unpa The court says:

"But assuming that the covenant in question was void, becau the receiver exceeded his powers, and that it did not bind the tate, the question arises whether he thereby rendered himself p sonally responsible for a breach of it. I am inclined to think th he did not, and that the instrument itself showing that the was done as a receiver, it cannot under any circumstances be co strued as a personal covenant. The party who took the assig ment knew all about its contents as they appeared, and it is p sumed he knew the law, and it is fair to assume he knew also th the covenant was void upon its face. If such was the law, therefore has no valid grounds for claiming he has in anv w been misled or deceived."

Applying this doctrine to the case at bar, plaintiff has no cau for complaint. The other decisions are to the effect that corpo tions have no right to violate their charters, but they have capaci to do so and to be bound by their acts, when a repudiation of su acts would result in a manifest wrong to innocent parties. Th principle does not control the acts of a receiver, whose powers a so strictly defined and limited by law as those of a receiver appoint by the Comptroller of the Currency, so far as to make his esta liable for acts of his in excess of his powers.

The trial court found in favor of the plaintiff in the sum of $587.70. Upon what theory this judgment was rendered we cannot tell from an examination of the record. As it appears however from the evidence, that the estate of the bank realized about $500 from the sale of the land in Iowa, obtained under the judgment of foreclosure, we suppose the court thought best, under the circumstances, that the plaintiff should recover back the amount actually realized by the bank, notwithstanding the receiver exceeded his authority in executing the contract. In other words, the court seems to have thought that the estate of the bank ought not to retain the benefits of a contract executed by the receiver in excess of his power. The defendant takes no exception to this judgment, and under the conclusion reached by us, plaintiff has no reason to complain thereof.

The judgment of the District Court must be affirmed.

All concur.

Judgment affirmed.

First National Bank of Fort Scott v. Drake.

(35 Kans. 564; 57 Am. Rep. 198.)

Directors — how to act.

To bind a National bank, the directors must act together as a board; their separate individual assent is ineffectual.

THE opinion states the case. The defendant had judgment below.

Ware & Ware, for plaintiff in error.

A. A. Harris, for defendant in error.

JOHNSON, J. This case can be easily disposed of. The only question presented arises upon the refusal of the court to enter judgment in favor of the plaintiff upon the findings of the jury, for the amount of money taken from the bank by the defendant, as

interest on demand certificates of deposit that had been issued t himself while he was serving as president and cashier of the bank The defendant admits that he took the money at the times and i the amounts charged by the plaintiff, and the jury have found tha during all the time the defendant was acting as an officer of th bank, there existed a rule or by-law of the bank which prohibite the payment of interest on demand certificates of deposit, and tha at no time while the defendant was an officer of the bank did h ever inform the board of directors that he had taken interest o these certificates; and it was also found that the directors did no at any meeting of the board authorize or ratify the action of th defendant in taking interest. The defendant contended and con tends that although his act in taking the money was contrary t the by-laws of the bank, yet that there had been a ratification o the unauthorized act by the board of directors which is bindin upon the bank. After stating that the directors had never at an meeting of the board ratified the taking of interest by the defend ant, the question was asked the jury: "Did the board of director at any time ratify the taking of the several amounts of interest? To this question an affirmative answer was given; but in the nex finding the jury explained particularly how the supposed ratificatio had been made, finding that it was "by individual consent of majority of the board." The last finding, stating particularly wha was done, controls and prevails over the former one, stating th general conclusion that there had been a ratification. These find ings clearly show that the only sanction which the unauthorize acts of the defendant have received from the plaintiff was give by the individual members of the board acting singly and separatel and not as a board. Action thus taken is not binding on the bank and does not constitute a defense to the plaintiff's claim. Th statute declaring the method in which the bank may exercise cor porate power provides that the appointment and dismissal of it officers, the enactment of by-laws regulating the manner in whic its officers and agents shall conduct its business, and the genera supervision and management of its affairs, shall reside in and b exercised by a board of directors. U. S. R. S., § 5136. Thi statute provides for the election of a president of the board, and otherwise assumes that the directors shall act unitedly as an organ

ized body. The election of an individual as a director does not constitute him an agent of the corporation with authority to act separately and independently of his fellow-members. It is the board duly convened and acting as a unit that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members. As the only powers conferred upon directors are those which reside in them as a board and when acting collectively as such, the individual consent of a majority of the members acting separately is not enough to ratify the unauthorized appropriation of the money of the bank by the defendant. Ang. & Ames Corp., § 504 *et seq.;* Morawetz Priv. Corp., § 247; Field Corp., § 242; *Baldwin* v. *Canfield*, 26 Minn. 43; *First National Bank* v. *Christopher*, 11 Vroom, 435; 29 Am. Rep. 262; *Junction Railroad Co.* v. *Reeve*, 15 Ind. 236; *In re Marseilles R. Co.*, L. R., 7 Ch. 161; *D'Arcy* v. *Tamor, etc., R. Co.*, L. R., 2 Exch. 158; *Schunn* v. *Seymour*, 24 N. J. Eq. 143; *Cammeyer* v. *United German Churches*, 2 Sandf. Ch. 186; *Edgerly* v. *Emerson*, 23 N. H. 555; 55 Am. Dec. 207; *Stoystown & Greensburg Turnpike Road Co.* v. *Craver*, 45 Penn. St. 386; *Keeler* v. *Frost*, 22 Barb. 400. See also the following cases, which are somewhat analogous and applicable: *Aikman* v. *School District*, 27 Kans. 129; *Mincer* v. *School District*, id. 253; *Comrs. of Anderson Co.* v. *P. & F. R. Co.*, 20 id. 534; *P. & F. R. Co.* v. *Comrs. of Anderson Co.*, 16 id. 302; *Herrington* v. *District Township of Liston*, 47 Iowa, 11; *McCortle* v. *Bates*, 29 Ohio St. 419.

The conclusion which we have reached renders it unnecessary to consider the other questions so much and so well argued by counsel with regard to the relations existing between the cashier and the board of directors, and which both of them sustain toward the bank, and whether the doctrine of ratification can have application to a transaction wholly between the board of directors and the cashier.

when the amount of recovery is not made an issue of fact, or l
to the discretion of the jury.

In this case, after the issues of fact were settled by the ju
the amount of recovery did not depend upon the discretion
either the court or jury, but upon a simple arithmetical calcu
tion according to the basis fixed by the pleadings; for by sub-s
tion 4, section 126, allegations concerning value or amount
damage, accompanied by an allegation of an express promise,
by a statement of facts showing an implied promise to pay su
value or damage, such as was contained in the petition in t
case, need not be proved unless traversed.

It is contended by counsel that there are three distinct groun
upon each of which the demurrer to the petition, as well as t
motion for a peremptory instruction to the jury, ought to ha
been sustained. These we will now consider.

1. The contract is void for want of mutuality and for want
sufficient consideration. The contract, as stated in the petiti
and about the nature and terms of which it seems to us there
no room for controversy, was fully executed by appellee, but on
in part by appellant; and it is for a breach of the executory p
this action was brought; and as there was nothing more to
done by appellee to entitle him to the right to demand a full p
formance by appellant of what it agreed to do, there can arise
question of a want of mutuality; for the consideration for wh
remained to be done, as well as what had been done by appella
had already passed from him, and been received by it. It is n
a pertinent inquiry whether either the consideration of the co
tract was sufficient, or, as has turned out, it was a judicious on
It was made at the instance of appellant or of its cashier, and,
we must presume, with the expectation of profit; and if t
bonds had been kept, instead of being sold by appellant, no lo
would have resulted from restoring them upon the demand of a
pellee, while a greater than the legal rate of interest would in t
meantime have been realized on the amount invested in them.

2. The next ground is that the contract is not within the sco
of the cashier's powers, and consequently not binding on t
bank. The special finding of the jury reduces the discussion
this question to very narrow limits — in fact, precludes app

lant from denying the authority of the cashier to make the contract; for if appellee sold the bonds to appellant, the bank, it necessarily follows they were appropriated and used by it; and having thus derived, or elected to avail itself of, whatever benefit might flow from the contract, it cannot now in good faith repudiate the contract, or any part of it; nor deny the authority of the cashier to make it.

3. The last ground is that the contract is *ultra vires* the corporate authority of the bank, in direct violation of its charter, and consequently is no such an obligation as will charge the bank, or make it to any extent, either in law or conscience, liable in damages or otherwise for breach of the conditions. It seems to us that if the proposition be conceded, it would not avail appellant; for if it had no authority, under its charter, to purchase the bonds, it cannot in justice and conscience refuse to abide by the judgment in this case, which involves nothing more than the return of the bonds and receipt of what it paid for them. To do less cannot be justified without permitting it to profit by its own wrong in violating the law of Congress under which it exists.

Probably, according to a fair construction of the National Bank Act, the power is not expressly given to appellant to purchase and deal in bonds of the character of those in question, but neither is it expressly prohibited by the act to do so. And there is a proper and well-recognized difference between "the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law, and a case of where legislative power to do the act has not been granted." See *Hitchcock* v. *Galveston*, 96 U. S. 341, and numerous authorities there cited. In that case the following, from *State Board of Agriculture* v. *Citizens' St. Ry. Co.*, 47 Ind. 407, was quoted with approval: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party, relying on the promise and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract."

If the special findings of the jury in this case be taken as true, there needs no argument to show that the rule there laid down

applies to the contract we are considering; and to adopt the o
posite of that rule would invite a disregard of the provisions
the National Bank Act, as well as fraud and bad faith towa
those dealing with a corporation existing under it.

It is not stated in argument or pleaded that appellee has waiv
his rights under the contract sued on, or that he delayed for
unreasonable length of time in demanding performance by appe
lant; and as the rulings of the lower court upon the pleading
as well as regards the instructions to the jury, are consistent wi
the views expressed in this opinion, the judgment must be
firmed.

Alves v. Henderson National Bank.

(Ky.)

Usury — penalty — interest after due.

**Under act of Congress June 3, 1864, § 30, providing that National bank
knowingly receiving or charging a greater rate of interest than allowed
the State where the bank is located, shall forfeit the entire interest whi
the note carries with it, or which has been agreed to be paid thereon, n
only is forfeited a greater sum reserved by the bank out of the money th
the legal interest for the time the note has to run, but also the interest a
cruing by law upon non-payment after maturity.**

**An agreement to pay illegal interest in a mortgage given to secure the not
after maturity, forfeits both legal and illegal interest, though no interest
expressed in the notes themselves.**

APPEAL from a judgment of the Circuit Court of Henderso
county. Action by the Henderson National Bank againa
W. S. Alves, trustee of Reutlinger and others on promissor
notes. Judgment for plaintiff for a portion of its demand, an
defendants appeal. Also cross-appeal by plaintiff.

Clay & Banks and *John Young Brown*, for appellants.

Yeaman & Lockett, for appellee and cross-appellant.

Bennett, J. To the appellee's (Henderson National Bank
action against Reutlinger and others on six promissory notes, eac

due and payable four months from its date, and each executed by said Reutlinger and others to the appellee, the appellant W. S. Alves, as trustee of said Reutlinger, etc., filed his answer, in which it was alleged in substance that said notes were executed for borrowed money; that at the respective times said money was borrowed the appellee, by an agreement with Reutlinger and others, put so much of it to their credit and retained the balance as interest for the next four months — the time that each note was to run; that the sum so retained out of each loan amounted to more than the legal rate of interest thereon for the four months that each note was to run. The reply of the appellee denied that it retained as much as the alleged sums as interest, but it did not deny that the respective sums were retained out of each loan. The bank, doubtless drawing a distinction between discount and interest, called these sums discount, and therefore denied that said sums were retained as interest; but the fact nevertheless existed that the sums were retained as compensation for the use of the money that it loaned to Reutlinger, etc., and which under the law constituted interest. A simple calculation will show that each sum so retained amounted to a greater rate of interest than six per cent on the sum from which it was retained. The answer also alleges that after the maturity of said notes, Reutlinger, etc., agreed to pay to the bank eight per cent interest on each note from its maturity until paid. After the maturity of the notes Reutlinger, etc., executed to the bank a mortgage on some real estate to secure the payment of them. In said mortgage it was expressly agreed that eight per cent interest was to be paid on each note (the note itself being silent as to interest) from its maturity until paid, and the mortgage secures the payment of said sum. The lower court abated the face of each note by the sum that the appellee retained thereon as interest, upon the ground the sum so retained amounted to more than the legal rate of interest, and by reason thereof said sum was forfeited; but the court gave judgment for the interest on each note at the rate of six per cent per annum from the maturity of the note until judgment was rendered thereon. From the latter part of the judgment Alves has appealed to this court; from the former part of the judgment the bank has taken a cross-appeal.

The conclusion is irresistible that the sum retained by the
pellee out of each note amounted to more than six per cent i
est, which is the legal rate of interest in this State, both in r
ence to individuals and State banks, for the period from the
of the note until its maturity. It is clear that the excess ove
per cent was usurious, and that the appellee knew it. Sec
30 of the National Currency Act of Congress of the 3
June, 1864, after prescribing that the National banks cre
under the said act shall not charge a greater rate of interest
that allowed by the laws of the State or Territory where the b
is located, declares:

"And the knowingly taking, receiving, reserving or charging a rate
terest greater than aforesaid shall be held and adjudged to be a forfeitu
the entire interest which the note, bill, or other evidence of debt carries
it, or which has been agreed to be paid thereon; and in case a greater ra
interest has been paid, the person or persons paying the same, or their
representatives, may recover back, in any action of debt, twice the amou
interest thus paid from the association taking or receiving the same; prov
such action is commenced within two years from the time the usurious t
action occurred."

It is held in the cases of *Tiffany* v. *Bank*, 18 Wall. 409; *B*
v. *Dearing*, 91 U. S. 29; 1 Nat. Bank Cas. 117; *Barnet* v. *B*
98 U. S. 555; 2 Nat. Bank Cas. 18; *Driesbach* v. *Bank*, 104 U
52; *ante* 19, that under the act of Congress, *supra*, if a Nati
bank knowingly takes, receives, reserves or charges a greater
of interest than that allowed by the laws of the State or Terri
in which the bank is located, such conduct shall be held and
judged a forfeiture of the entire interest which the note, bill
other evidence of debt carries with it, or which has been agr
to be paid thereon, etc. The perspicuity and directness of
clauses of said section leave no room to doubt as to their m
ing. The courts that have passed upon them have had but li
else to do, in order to evolve their meaning, than to recall
repeat their language. Having determined that the sum retai
as interest on each note, for the period of four months, amoun
to more than six per cent for that period, and by the laws
this State the contract was usurious, it follows that the inte
for said period at least was forfeited, and that the judgment
the lower court deducting the sum so retained from each n

must be affirmed on the cross-appeal. But the appellee, the bank, contends, that as each note was silent as to interest from and after its maturity, the six per cent interest that the same bore after maturity was by virtue of the law, and not by contract. Therefore the usurious interest that said notes bore from their respective dates until maturity did not under said act forfeit the interest arising on the notes after maturity, by virtue of the law, and not by contract. The appellant Alves contends for the reverse of this proposition. A scrutiny of the clauses of the section, *supra*, will show that the appellant's contention is correct. To knowingly take, receive, reserve or charge a rate of interest greater than that allowed by the State law, shall be held and adjudged to be a forfeiture of the entire interest which the note, bill or other evidence of debt "carries with it, or which has been agreed to be paid thereon." The expression "carries with it" means any interest that the note, bill or other evidence of debt may carry by operation of law; for the next succeeding clause, to-wit: "or which has been agreed to be paid thereon," leaves no doubt as to the meaning of said expression. In many States of the Union, as was the case in this State at one time, there was at the time of the passage of said act of Congress a fixed rate of interest to be charged in the absence of contract, and by contract a greater rate of interest might be charged. It seems clear therefore the expression "carries with it" refers to such interest as the note, etc., may carry without reference to any agreement, and that the succeeding clause refers to such conventional legal rate of interest as the parties may have agreed on; both of which shall be forfeited if any usurious interest has been taken, received, reserved or charged. Also the language clearly means that if usury has been agreed to be paid for any part of the time that the note is entitled to run, or that it may by indulgence run, such agreement forfeits the entire interest that the note or bill carries with it; or if the note or bill bears a conventional rate of interest, such as some States allow, and in addition thereto usury has been charged for any part of the time, such conventional rate of interest is thereby forfeited. The framers of the act of Congress under consideration doubtless understood that much of the business of the banks created by the act would consist in lending money secured by

notes, etc., made due and payable not exceeding four month from date, and if need be, renewed from time to time; that th usurious contracts would relate to the time such notes were t run, and in case of their renewal, so also would the usurious con tracts be renewed. Hence the act provides, in substance, that i case usury is taken, received, reserved or charged, the entire in terest that the note carries, or that may exist by agreement, shal be forfeited. The foregoing views accord with the case of *Ban* v. *Stauffer*, 1 Fed. Rep. 187–189; 2 Nat. Bank Cas. 178. I that case the bank had received usurious interest for the tim that the note was maturing. The question was, did that fac forfeit the interest accruing on the note after its maturity Judge McKennan, delivering the opinion of the court, held i substance, that according to the clause, *supra*, declaring the tak ing of usury a forfeiture of the entire interest that the note car ries with it, the taking of usurious interest during the maturit of the note forfeited the interest accruing thereon after its ma turity, as well as that accruing before its maturity.

But if we are mistaken in reference to the forfeiture of the in terest that accrued upon these notes by virtue of the law, afte their maturity, nevertheless the question is put at rest by the fac that it is expressly stipulated in the mortgage given to the appel lee by Reutlinger, etc., to secure these notes, that eight per cen interest was to be paid thereon from the maturity of each not until paid. The bank accepted this agreement, which, under th laws of this State, leaving out of view the act of Congress, *supra* was valid, and upon a sufficient consideration, except two per cen thereof, which was usurious and invalid. But under the said ac of Congress it is not necessary, in order to effect a forfeiture o the entire interest, that the agreement to pay usury should appea in the note, or that the agreement should be made simultaneously with the agreement to lend the money. Were the law so con strued, the effect would be to enable the bank to evade the law every day by reducing the usurious contract to writing on a sep arate piece of paper, or by making it after the contract to loan the money was entered into. So the agreement set forth in the mortgage to pay usurious interest being, as contended by counsel, collateral, and having been made after the maturity of the notes,

does not affect the question; for the agreement to pay a legal rate of interest was as binding as the agreement to additionally secure the debt itself, and the fact that the agreement was collateral did not change the agreed interest into principal. It was accruing every day as interest on the principal, and was in fact and in law interest, although expressed in the mortgage, and not in the notes; and as the agreement included usurious interest, it comes within the act of Congress which forfeits the entire interest. The judgment of the lower court is affirmed on the cross-appeal of the bank; and the judgment on the appeal of Alves, trustee, is reversed and the case is remanded, with directions to disallow the interest on each note from its maturity until the judgment was rendered thereon.

New Orleans National Bank v. Raymond.

(29 La. Ann. 355; 29 Am. Rep. 335.)

Mortgage — power to take, on sale of real estate.

A National bank may sell its real estate and take a mortgage for the purchase-money.

PROCEEDING to cancel a conveyance as a cloud upon title. The opinion states the facts.

Charles Louque and *Carleton Hunt*, for Joseph Billgery, appellee.

McGloin & Nixon and *Magruder & Richardson*, for appellant.

SPENCER, J The Union National Bank of New Orleans sold to Joseph Raymond by authentic act of date the 27th of February, 1873, a certain parcel of ground in the square bounded by First, Second, Dryades and Baronne streets, for the price of $14,666.66, one-fifth of which was paid in cash, and for the balance Raymond executed notes at one, two, three and four years,

secured by special mortgage and pact of *non alienando* on t property.

On the 10th of April, 1873, Raymond entered into a contr with the city of New Orleans, acting through its mayor und ordinance No. 2041, administration series. By that contract Ra mond bound and obligated himself in substance to erect on s grounds a market-house according to certain specifications; free the property of all mortgages and incumbrances on or befo the completion of said building, and to keep the market as quired by the city ordinances, etc. Raymond during the first t years was to receive all the rents and revenues. At the expi tion of the first ten years the city was for the next ten years farm out the market and take all the rents and revenues in cess of $500 per month, or $6,000 per year, the rents up to sa amounts to be paid to Raymond, his heirs or assigns. At t end of the second term of ten years Raymond was to transfer t grounds and market in full ownership to the city, binding hi self not to alienate or incumber the same to the prejudice of th agreement.

On the 10th of March, 1874, the New Orleans National Ba obtained judgment on a bill of exchange for $700 against Josep Raymond, issued execution thereon, seized, and on the 24th July, 1876, sold and purchased for $150 "all the right, title an interest of Joseph Raymond in, to and under the contract mad with the city of New Orleans of date April 10, 1873." * * "The said act of April 10, 1873, conferring upon him the rig to the revenues of a market constructed by him at the corner Second and Dryades streets, in the square bounded by Secon First, Dryades and Baronne streets, for the term of twen years," etc.

On the 5th of September, 1876, said New Orleans Nation Bank sold and transferred, in consideration of the amount due with subrogation, to Mrs. Baranco, all its rights in, to and und said judgment and purchase.

On the 24th of May, 1876, the Union National Bank, und executory process against Raymond upon said vendor's mortgag seized the above-described lots of ground, "together with all th buildings and improvements thereon," and advertised the sam for sale on the 1st of July, 1876.

On June 29, 1876, Joseph Billgery purchased and was subrogated to the judgment in the case of "*Andrew G. Downey* v. *Joseph Raymond*," for some $1,250, being for work done on said market buildings.

On the 1st of July, 1876, the day of sale, Joseph Billgery paid to the Union National Bank the mortgage note due, and the sale was not made. Subsequently he took up and paid the remaining outstanding vendor's note held by the Union Bank. Billgery did not take a formal act of subrogation at the time of his payment on the 1st of July, but on the 2d of August, 1876, the bank gave him a receipt and subrogation to his rights.

Billgery, as subrogee of the Union National Bank, caused said property to be re-advertised for sale on February 10, 1877, and re-advertised again for sale on March 3, 1877.

On the 24th of February, 1877, he commenced the proceeding now before us, being a rule taken on Mrs. Baranco to show cause why the act of adjudication by the sheriff to the New Orleans National Bank above described (to which she had been subrogated) should not be erased and canceled from the books of the office of conveyances, for the reason that the same is null and void and operates injuriously to him (Billgery) as a cloud upon the title of said property.

Mrs. Baranco pleads by way of exception and answer in substance as follows:

First. That plaintiff in rule, not being a party to the suit of *New Orleans National Bank* v. *Joseph Raymond*, cannot proceed in this summary manner to set aside the adjudication, and should proceed by direct action.

Second. That the pretended mortgage to the Union National Bank is void, as taken in contravention of the laws of the United States creating National banks; that said bank under said laws is prohibited from owning real estate and from taking or holding mortgages thereon under the circumstances of this case.

Third. That the mortgage to the Union National Bank has been extinguished by payment, and that said Billgery was not subrogated thereto.

Fourth. She alleges her ownership of the rights of Raymond under the said contract with the city, and that she is entitled

thereby to the rents and revenues of said market in the hands
the sheriff.

Fifth. By way of reconvention she prays and demands the nu
lity of Billgery's pretended mortgage rights and for their cance
lation, and that she be declared entitled to the revenues of sai
market.

Upon these issues the case was tried. There was judgmer
for plaintiff ordering the erasure and cancellation of Mrs. B
ranco's title, and decreeing its nullity. She prosecutes this appea

The first question naturally presenting itself is, whether or n
the plaintiff Billgery has the right to proceed by rule and in
summary manner as he has done? This depends upon the natu
of Mrs. Baranco's rights. Plaintiff cannot bring a petitor
action by rule, nor can he institute an action of nullity in th
manner. Her counsel insists truthfully, that she did not buy th
market property itself, but only Raymond's rights under the co
tract with the city to take its revenues. He asserts that und
said contract with the city the market building, though put b
Raymond at his own proper expense upon the ground bought b
him from the bank, did not constitute a part of the realty, bu
was a mere movable and not subject to the bank's vendor's mor
gage. He further argues, that under the said contract with th
city the property was inalienable, and therefore even if the build
ing was immovable, it was not mortgageable.

These propositions are, upon purely elementary principles, u
terly untenable. The bank was admittedly owner of the lot
Both parties claiming under the bank, neither can or does disput
its title. The bank sold these lots to Raymond. Raymond b
came the owner. Raymond, the owner, at his own proper cost
put a building on these lots. The building thereby became im
movable by accession and a part of the soil. Raymond therefor
owned the soil with the building on it. The bank had its mor
gage (if any existed) upon the soil and the building as its acce
sory. O. C. C. 455, 496, 497, 498. These consequences an
principles flow from the laws of the State which are paramount an
must govern. The contract between Raymond and the city coul
not affect the legal rights of the bank. It would be strange in
deed if a vendee, owing part of the price, could deprive hi

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vendor of recourse upon the property sold, by entering into a contract with a third person declaring the property inalienable, or by agreeing to put buildings on it which he stipulates shall not be subject to the vendor's claim, or by promising to transfer the land and buildings to such third person at a future day.

We have seen that Raymond owned the land and the building and that both were subject to the bank's mortgage, the land and building being in reality but one piece of real estate. Raymond's interest in and to the future revenues of this property could not be sold distinctly and separately from the property itself. He did not derive his right to its revenues from the city, but from his ownership. His contract with the city put restrictions upon his rights, but did not create them. But it is manifest that no agreement between Raymond and the city could affect the rights of the bank. We regard the seizure and sale of Raymond's interest in the future revenues of a property of which he was owner as utterly null and void; for where the rights of ownership and enjoyment are vested in one and the same person they constitute a unity, a single thing, and cannot be seized and sold separately. They must be seized together or not at all.

We conclude therefore that the rights so-called of Mrs. Baranco are mere appearances without substance, and as the inscription of her deed is calculated to injure the rights of persons claiming or owning said property, any party showing an interest may proceed summarily to have the cloud removed. See 2 La. Ann. 650.

It therefore only remains for us to inquire whether Joseph Billgery shows an interest in having this done.

He claims to be subrogee of the vendor's mortgage held by the Union National Bank. If that be a valid mortgage and he be the holder of it his demand is well founded.

Counsel for defendant in the rule urges strenuously that the mortgage in favor of the bank was in its inception null and void, as violative of the National Bank Act. He admits that the bank was the owner of the lots in question, but contends that it could not sell them on a credit, reserving a mortgage and privilege for the price, and that such mortgage and privilege were absolutely void. The twenty-eighth section provides as follows:

"And be it further enacted, That it shall be lawful for any such associ tion to purchase, hold and convey real estate as follows: First, such shall be necessary for its immediate accommodation in the transaction of business. Second, such as shall be mortgaged to it in good faith for deb previously contracted. Third, such as it shall purchase at sales under jud ments or decrees or mortgages held by such association, or shall purcha to secure debts due to said association. Such association shall not purcha or hold real estate in any other case or for any other purpose than as spe fied in this section," etc.

As stated, there is no dispute as to the bank having been own of the lots, and therefore it must have acquired in some one the modes specified in the act. The act gives authority to pu chase under certain restrictions, but there is no restriction upo the power "to convey." The intent and policy of the law manifest. It was to discourage, to prevent the accumulation real estate in the hands of these banks. But if such was the i tent, it would be strange if the power and right "to convey to sell, were restricted. We would expect the largest liberty this direction, as being in furtherance of purposes of the law giver. It is unreasonable to conclude that because the law giv the power to do business "by loaning money on personal sec rity," and restricts the right to purchase real estate, therefore forbids the sale of such real estate as may have been lawfull acquired upon the usual and customary terms of the commerci world, and strikes with nullity such vendor's liens and mortgag as may be retained to secure deferred parts of the price. If d fendant's theory be right, then a National bank in Louisiana ca not sell real estate on a credit at all, even without mortgage, f under our law the vendor has for his security, by mere operatio of law, both his lien and the right of resolution of the sale, whic would constitute real securities for debt in violation of the Ban ing Act. We conclude therefore that there is nothing in the la preventing a National bank from selling its real estate on term of credit and reserving a mortgage to secure the price.

The remaining question is, was Billgery subrogated to th bank's mortgage? It is unnecessary to discuss the effect of th receipt and conventional subrogation given to him by the ban on the 2d of August, 1876. He was a creditor of Raymond o the 29th of June, 1876, by subrogation to the judgment

Andrew G. Downey. He paid the mortgage note to the bank on the 1st of July, 1876. Subrogation took place by effect of law. Civil Code (old), 2157.

There is no proof that Billgery acted as Raymond's agent that is satisfactory. It is conceded on all sides that it was Billgery's money that was paid, and the weight of evidence is largely in favor of his having done so in his own interest and behalf.

It is therefore ordered, adjudged and decreed by the court that the judgment appealed from be affirmed with costs of both courts.

Judgment affirmed.

Parkhurst v. Citizens' National Bank of Baltimore.

(61 Md. 264.)

Cashier — affidavit — under Procedure Act. Mistake in docket entry — correction by court — affidavit of clerk — evidence.

Where a National bank sues under the Procedure Act of 1864, chapter 6, the cashier may make the affidavit required to be filed with the declaration, stating the true amount that the defendant is indebted to the plaintiff over and above all discounts.

Where the clerk in making the docket entries by mistake enters on the docket "copy of promissory note" instead of "promissory note," the court will direct the entry to be corrected, and the proper entry made; and the affidavit of the clerk is admissible to show that the docket entry was a mistake.

APPEAL from the Baltimore City Court. The opinion shows the case.

John Henry Keene, Jr., for appellants.

Nicholas P. Bond, for appellee.

Robinson, J. This suit is brought under the Procedure Act of 1864, chapter 6, passed for the purpose of dispatching business in the Superior Court and the Court of Common Pleas of Baltimore city.

The act provides the plaintiff must at the time of bringing the suit file with the declaration an affidavit, stating the true amount

governed by those statutes. Among the provisions therein co tained are the following:

"Any association may take, receive, reserve and charge on any loan or d count made, or upon any note, bill of exchange or other evidence of debt, terest at the rate allowed by the laws of the State, Territory or district wh the bank is located, and no more." U. S. R. S., § 5197.

"The taking, receiving, reserving or charging a rate of interest grea than is allowed by the preceding section, when knowingly done, shall deemed a forfeiture of the entire interest which the note, bill or other evide of debt carries with it, or which has been agreed to be paid thereon." § 51

The rate of interest allowed by the laws of the State of Ne Hampshire, where the note sued on was made, was six per cen Gen. Laws of N. H. of 1878, chap. 232, §§ 2, 3. Interest at higher rate has been received by the plaintiff on this note, and notes in renewal of which it was given.

The question before us is, whether any deduction should made from the amount apparently due on the note, according its terms, on account of this receipt of interest in excess of s per cent. It was held in the Superior Court that no such dedu tion should be made, and that the plaintiff was entitled to jud ment for the amount of the principal of the note and interes This was error.

The taking of interest at a rate in excess of six per cent was violation of a law of the United States which is in force in th Commonwealth as well as in New Hampshire, so far as relates contracts made by National banks existing in New Hampshi The rate of interest which a National bank in any State may tak is determined and fixed by the statute of the United States, a though it is measured in such State by reference to the local la concerning interest, if there be one. And when a bank takes i terest in excess of the legal rate, it violates the law of the Unite States, and not the law of the State; and the consequences a those provided by the law of the United States, and not thos provided by the State law. *Davis* v. *Randall*, 115 Mass. 547 15 Am. Rep. 146; *Central National Bank* v. *Pratt*, 115 Mas 539; 15 Am. Rep. 138; *Farmers & Mechanics' National Ban* v. *Dearing*, 91 U. S. 29; 1 Nat. Bank Cas. 117.

As the law regulating the rate of interest which the plaintif might lawfully take is a National law, as binding in this Commo

wealth as to all matters affected by it as our own laws are, the case differs from those in which it has been held that a penalty, as a partial defense, authorized by the laws of another State, cannot be applied or made effective in this State. See *Akers* v. *Demond*, 103 Mass. 318; *Gale* v. *Eastman*, 7 Metc. 14.

The taking of excessive or usurious interest made the note inoperative as to all the interest which it carries by its terms by virtue of a law in force throughout the United States. The forfeiture of interest may be availed of in an action on the note, by way of defense. *Farmers & Mechanics' National Bank* v. *Dearing*, *supra*. In the case cited, the suit was in the State where the usurious interest was taken. But there is no reason for holding that when the suit is in another State, the same defense is not open. That would be saying that the National law shall be inoperative in defense of an action brought outside the State where it was violated by the plaintiff. It would be saying that the National law against usury shall be operative in defense within the State where it was exacted, and inoperative in the rest of the Union; that a usurious contract by a National bank is void *pro tanto* in the State where it was made, and good without abatement elsewhere. This cannot be.

There is nothing in *Barnet* v. *National Bank*, 98 U. S. 555; 2 Nat. Bank Cas. 18, which is inconsistent with the doctrine of *Farmers & Mechanics' Bank* v. *Dearing*, *ubi supra*. In the earlier of the two cases it was decided that where a National bank in the State of New York had taken usurious interest on a note, it was entitled to recover in a suit on the note the amount of the principal of the note less the amount of the interest unlawfully reserved. In the latter case it was decided that in an action on a bill of exchange, the assignees in bankruptcy of the acceptor, who became defendants, could not set off, as a counter-claim, twice the amount of usurious interest which had been paid by the acceptor on other bills and on notes which had been paid up by him. The statute, in section 5198, provides for the forfeiture of all the interest which the note carries with it, where the bank has taken or reserved or charged a higher rate than the court allows. The maker of the note can avail himself of this provision in defense of an action on the note, and in no other way. *Farmers &*

Mechanics' Bank v. *Dearing*, *supra*. The same section provi further that if the greater rate of interest has been paid, the p son by whom it has been paid, or his legal representatives, m recover back, in an action in the nature of an action of de twice the amount of the interest thus paid from the bank taki or receiving the same. This remedy is applicable when the n has been paid, and ordinarily at least, not till then, and can availed of only in the form prescribed by the statute, that is say, by action against the bank.

The forfeiture of the interest can be availed of in an action the State court as well as in the United States court. It would a strange condition of the law which permitted a National ba the creature of a National law, to avoid in a State court a defe to its action on a contract which is expressly provided for by t statute under which the bank exists. This point is settled in t case already cited of *Farmers & Mechanics' Bank* v. *Dearin* which was a writ of error to a court of the State of New Yo and in which the Supreme Court of the United States held th the bank was entitled to judgment only for the principal less t unlawful interest taken, and ordered proceedings in the St court accordingly.

We are of opinion further, that as the reserving or taking unlawful interest avoids the note so far as interest is concern the defense is open to the defendant in any action brought to cover the amount of the note, though it be more than two ye after the unlawful taking of interest. The statute does not fi limit of two years within which such defense must be availed It limits the time within which an action may be maintained recover twice the amount of unlawful interest paid to two yea But as we have seen, that is an entirely different matter from t defense of usury in an action on the note.

According to the terms of the case stated, the case must sent to an assessor to determine the amount to be deducted fr the note sued on, and the amount, if any thing, for which jud ment shall be entered.

Judgment accordingly.

NOTE BY THE REPORTER. — It is true that in Farmers & Mechanics' Bank v. Dear 91 U. S. 29; 1 Nat. Bank Cas. 117, the bank was allowed "to recover the principal of note sued upon, less the amount of the interest unlawfully reserved." But in Ba

v. Nat. Bank, 98 U. S. 555; 2 Nat. Bank Cas. 18, without expressly overruling the former it was distinctly held that neither the usurious interest paid could be set off, nor could twice the amount thereof be recovered by way of counter-claim. The court said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved must resort. He can have redress in no other form or mode of procedure." The latter doctrine has been accepted in the authority of the latter case by the Pennsylvania Supreme Court in First Nat. Bank of Clarion v. Gruber, 87 Penn. St. 465; 2 Nat. Bank Cas. 395: and by the New York Court of Appeals, upon reargument in Nat. Bank of Auburn v. Lewis, 81 N.Y. 15, *post* , modifying the rule as laid down by that court in the same case, 75 id. 516; 31 Am. Rep. 484; 2 Nat. Bank Cas. 305, in accordance with the decision in the Barnet case. In the Lewis case the court said: "In accordance with a well-settled principle we must follow and stand by its decision upon the main question determined, that in an action brought to recover the amount of a promissory note discounted by a National bank, it cannot be set up by way of counter-claim or set-off that the bank in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took and was paid a greater rate of interest than that allowed by law, and that the remedy in such a case is an action of debt to recover back twice the amount paid." To the same effect, Oldham v. First Nat. Bank, 85 N. C. 240. In Monteau Nat. Bank v. Miller, 73 Mo. 187, it was held, in conformity also to the Barnet case, that where the usurious interest has been stipulated for but not paid, the bank can recover only the sum lent.

Peterborough National Bank v. Childs.

(133 Mass. 248; 43 Am. Rep. 509.)

Usury — set-off.

In an action by a National bank upon a note, the defendant is not entitled to any set-off for illegal interest exacted by the bank upon the discount thereof, but the bank can recover only the principal of the note.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

A. De Wolf, for plaintiff.

C. C. Conant, for defendants.

Devens, J. The act of Congress to establish a National currency superseded the State laws on the subject of usury so far as they might otherwise be applicable to National banks. U. S. Stat., June 3, 1864, § 30; U. S. R. S., §§ 5197, 5198; *Central National Bank* v. *Pratt*, 115 Mass. 539; 15 Am. Rep. 138; 1 Nat. Bank Cas. 195; *Davis* v. *Randall*, 115 Mass. 547; 15 Am. Rep. 146; 1 Nat. Bank Cas. 600. The power vested in

bank to recover the amount of a note which was given in re
newal of other notes, the defendant is entitled, where illegal in
terest has been exacted, to credit for all the interest he has paid
from the beginning on the loan, and not merely to the excess abov
the lawful rate. See also *Lucas* v. *Government National Bank*
78 Penn. St. 228; 21 Am. Rep. 17; 1 Nat. Bank Cas. 872; *Cak*
v. *First National Bank*, 86 Penn. St. 303; 1 Nat. Bank Cas
890; *Brown* v. *Second National Bank*, 72 Penn. St. 209; 1 Nat
Bank Cas. 849; *Shunk* v. *First National Bank*, 22 Ohio St. 508
10 Am. Rep. 762; 1 Nat. Bank Cas. 820; *Stephens* v. *Monongahela National Bank*, 88 Penn. St. 157; 32 Am. Rep. 438; 2 Nat
Bank Cas. 398; *In re Wild*, 11 Blatchf. 243; 1 Nat. Bank Cas
246; *National Bank of Auburn* v. *Lewis*, 75 N. Y. 516; 2 Nat
Bank Cas. 305.

On the other hand, in *Barnet* v. *National Bank*, 98 U. S. 555
2 Nat. Bank Cas. 18, it was held, that where illegal interest ha
been paid upon the discount of negotiable paper, it cannot, in a
action upon such paper, be applied by way of set-off or payment
nor can the double amount of such interest be allowed by way o
counter-claim, but the party is restricted to his legal remedy by a
independent action. This construction by the Supreme Court o
the United States of a law passed by Congress under its consti
tutional authority, must be deemed authoritative. *Scribner* v
Fisher, 2 Gray, 43; *Potter* v. *Irish*, 10 id. 416; *Johnson* v. *Merrill*, 122 Mass. 153. The decisions above cited were made befor
it was announced. It is accepted as final upon this point by th
Supreme Court of Pennsylvania in *First National Bank o*
Clarion v. *Gruber*, 91 Penn. St. 377; 2 Nat. Bank Cas. 395. I
that case the court below had ruled that there could be a recover
for such moneys as were paid by the plaintiff as interes
or discount where such moneys so paid were in excess of six pe
cent, which was apparently the lawful interest. Mr. Justic
Gordon, in giving the opinion of the Supreme Court of Penn
sylvania, says very frankly: "By a recent decision of the Supreme
Court of the United States, this would seem to be error, but it i
an error of this court rather than of the court below, for our de
cisions in *Lucas* v. *Bank*, 78 Penn. St. 228; 21 Am. Rep. 17;
Nat. Bank Cas. 872, and kindred cases were followed." Afte

stating the facts in *Barnet* v. *National Bank, supra*, he adds: "From this it appears that neither by set-off nor original action can interest over legal rate, paid to a National bank, be recovered except by way of penalty, as prescribed by act of Congress of June 3, 1864." See also *National Bank of Fayette County* v. *Dushane*, 96 Penn. St. 340. The same effect is also given to this decision of the Supreme Court of the United States by the Court of Appeals of New York in *National Bank of Auburn* v. *Lewis*, 81 N. Y. 15, *post* .

While the defendants upon proper proofs were entitled to recover double the amount of the illegal interest paid by them, they could only do so by resorting to a suit brought specially for that purpose within the time limited by law. The right to avail themselves of such payments in set-off was not given by statute, and the deductions claimed by them cannot be made.

There remains the single inquiry whether the plaintiff is entitled to any interest upon the note now in suit. This the plaintiff claims at least from the date of the writ. It is found that the sum of $11.16 was the amount of illegal discount paid upon the note in suit. Discount is either interest taken in advance or reserved in the note. As the note continued always for the same amount, this sum was therefore paid in advance. In *Barnet* v. *National Bank, supra*, Mr. Justice SWAYNE, in analyzing section 5198 of the United States Revised Statutes, says two categories are thus defined and the consequences denounced: 1. Where illegal interest has been knowingly stipulated for but not paid, there only the sum lent without interest can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives.

The effect of the first clause seems to us inadvertently stated by the learned judge in this, that it fails to include all the contingencies provided for by that clause, which applies the forfeiture of interest upon the note or other security, not merely where illegal interest has been stipulated for but not paid, but also where it has been knowingly taken, received or reserved. This analysis is used by Mr. Justice SWAYNE argumentatively, and does not affect the

points decided by the case or involved in the judgment of the c
which determines only two questions: first, that payment
usurious interest cannot be applied in offset or payment to the
of exchange in suit; and second, that a claim to recover do
the amount of illegal interest, paid by way of counter-claim in
pending suit on the bill, cannot be maintained. The category
vided for by the first clause of the section is here found to e
because it is found that illegal interest was knowingly paid to
amount of $11.16 on the note in suit. The forfeiture of the inte
which the note carries with it, or which has been stipulated t
paid thereon, is attached to the instrument itself. It may be
sisted upon by way of defense to the note whenever it is sued.
is it so limited that it must be set up within two years, altho
the penal action provided for by the second clause of the sec
must be brought within that time. *First Nat. Bk. of Pe
borough* v. *Childs*, 130 Mass. 519; 39 Am. Rep. 474;
465. As the note can be made the foundation only of a judgm
which does not include interest upon it, had the legal interest
$11.16 been reserved from the note instead of having been p
upon it, the note would have carried that interest with it, and t
sum would have been forfeited, as well as all other sums of in
est which might have accrued. *Auburn National Bank* v. *Le
supra.* Where such payment is made in advance, the in
est-bearing quality of the note is equally destroyed, although th
cannot be a deduction of the illegal interest paid by way of off
The judgment in this case for the face of the note, without
terest, was therefore correct.

Judgment affirmed.

HUNT, APPELLANT.

(141 Mass. 515.)

Certificate of deposit — power to issue — purchase by trustee — evidence — custo

A certificate of deposit issued by a National bank, payable to the order of
depositor, on return of the certificate properly indorsed, and understood

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tween the bank and the depositor not to be payable until a future day agreed upon, is not in violation of the National Banking Act.

The purchase, by a trustee, with the trust funds, in good faith, of a certificate of deposit, payable at a future day, issued by a National bank, the stock of which was selling at par, and occasionally at a small premium, and which was issuing large numbers of such certificates to individuals, savings banks and trust companies, will not render the trustee liable for a loss arising from the failure of the bank before the day stipulated for the payment of the certificate.

In such a case, evidence is admissible to show that at and about the time of such investment, the bank issued large numbers of such certificates to individuals, savings banks and trust companies; and the evidence of bank examiners, that it is not usual for National banks to issue such certificates, is also admissible.

APPEAL by the trustee under the will of Charles S. Lynch, from a decree of the Probate Court disallowing an item in his account for a loan of $1,900 to the South Boston Iron Company, upon collateral security, and an item of a loan of $2,100 to the Pacific National Bank; and ordering the trustee to reinvest the sum of $4,000 in some safe and secure manner.

The master reported as follows:

It was stated by the trustee, and I find, that of the principal of said trust fund, the sum of $1,900, mentioned in item 1, is available by him at once as cash in hand. I find that all of said trust fund, to-wit, said $4,000, was at one time lent by said trustee to the South Boston Iron Company, secured by good collateral securities; that on September 14, 1881, he took a part of said trust money, or fund so invested, and purchased a certificate of deposit in the Pacific National Bank of Boston, a banking corporation organized under the laws of the United States and then doing business in Boston. Said certificate was signed by the cashier and countersigned by the teller, and was in the following form: "The Pacific National Bank of Boston, Mass. $2,100. Boston, September 13, 1881. This certifies that William L. Lovell has deposited in this bank twenty-one hundred dollars, payable to the order of himself on return of this certificate properly indorsed."

On the back of the certificate was the following, signed by said Lovell: "On January 25, 1882, pay the within certificate to the order of William P. Hunt;" and the following signed by Wil-

liam P. Hunt: "Pay to the order of William P. Hunt, trust under the will of Charles S. Lynch, for the benefit of Miss R becca Lynch."

At the time of the purchase, Lovell informed the trustee th there was an agreement or understanding between him and t bank, made at the time when he obtained said certificate of d posit, that the money which it represented should not be call for until January 25, 1882, which I find was the fact. Sa trustee purchased it for less than $2,100 by a sum equal to t interest at the rate of six per cent per annum on it from Septe ber 14, 1881, to January 25, 1882, which interest was $47.25 (t trustee paying to Lovell for said certificate $2,052.75), and whi interest the trustee has allowed to the *cestui que trust* in l accounts with her. These sums were paid by two checks. find that at the time of the purchase of said certificate of d posit, the bank had been regularly organized and was doi business as a National bank in Boston, the stock of which th sold at par; occasionally, about that time, at a small premiu Said bank failed on November 18, 1881, and subsequently receiver was appointed to wind up its affairs. To the prese time the receiver has paid to the trustee dividends amountin to ten per cent on the amount of said certificate. This certi cate has been allowed by the receiver of the bank as a val claim against it for the amount of the certificate, but it is n probable that more than twenty-five per cent of said claim w be realized. If the question of good faith or bad faith of t trustee in the purchase of said certificate is one which I shou find under said order to me, I find that the trustee purchas said certificate in good faith, and he offered evidence again the objection of the *cestui que trust* to show, and if it is co petent for him to show it, I find, upon such evidence offered a objected to, that the bank issued to various persons and partie including savings banks and trust companies in the last thr months of 1880, nearly two hundred certificates of deposit, a in the year 1881, up to the time of its failure, about nine hu dred certificates; some of them were drawn payable on the face at some future time, and as to others there was an agre ment that the bank should not be called on to pay them unt

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some future time. All this evidence of the issue of such certificates so objected to, and said finding upon it, are to be struck out if the court adjudges it incompetent.

The *cestui que trust* did not know of the investment of any of the trust fund in said certificate until after the failure of the bank, and she never assented to it. The trustee, who was, in September, 1881, president of the Atlas National Bank in Boston, on cross-examination said that he knew of but one instance of the issuing of a certificate of deposit by a National bank payable on time, and in that instance the certificate was payable on two weeks' time; and he also said that he did not know whether he knew of this instance at the time of his purchase of said certificate in September, 1881.

At the hearing before me, the *cestui que trust* offered evidence against the objection of the trustee to show by the testimony of C. O. Billings, formerly National bank examiner, appointed under the laws of the United States, and now president of the Globe National Bank in Boston, and J. W. McGruder, now such bank examiner in Boston, that it was not and is not usual or customary for National banks to issue certificates of deposit payable at a future time, stated either on the face of the certificate or by an agreement with the payee. And if it is competent to show the facts offered to be shown by this testimony (to all of which facts the trustee objected as incompetent), then I find the facts to be as above stated by said Billings and McGruder; and if not competent, then the evidence, testimony and finding of this fact are to be struck out.

Case reserved for the consideration of the full court.

A. Russ, for appellant.

C. T. Gallagher, contra.

C. Allen, J. In *Harvard College* v. *Amory*, 9 Pick. 446, 461, it was declared: "All that can be required of a trustee to invest is, that he shall conduct himself faithfully, and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of

their funds, considering the probable income, as well as th probable safety of the capital to be invested." In that case i vestments in stocks of an incorporated manufacturing compar and of an incorporated insurance company were held to hav been within the authority of the trustees. This general stat ment of the rule has been adhered to ever since. *Lovell* *Minot*, 20 Pick. 116; 32 Am. Dec. 206; *Kinmonth* v. *Brigha* 5 Allen, 270; *Clark* v. *Garfield*, 8 id. 427; *Brown* v. *Frenc* 125 Mass. 410; 28 Am. Rep. 254; *Bowker* v. *Pierce*, 130 Mas 262 In the present case the will under which the trustee w appointed is not before us, and his authority in respect to th investment in controversy is to be determined on general pri ciples.

1. The fact that the certificate of deposit was indorsed b Lovell to Hunt, and by Hunt to himself as trustee, does not itself show that the latter indorsement represented a transactio by which Hunt individually transferred the certificate to himse as trustee. The fact as found is the other way. The transfer t him personally appears to have been a mere form. The purcha was by Hunt as trustee, and the payment was from the tru funds.

2. The certificate of deposit was not illegal, as being in viol tion of the United States Revised Statutes, section 5183, whic forbids National banks to issue any other notes to circulate money than such as are authorized by the provisions of the sta ute. In *Shute* v. *Pacific Bank*, 136 Mass. 487, it was held tha a certificate of deposit, in the same form as that now before u was not to be deemed a promissory note, within the meaning o the General Statutes, chapter 53, section 10, which provide tha in any action by an indorsee against the promisor upon a prom issory note payable on demand, any matter shall be deemed legal defense which would be a defense to a suit thereupon i brought by the promisee; so that the bank was held not to b entitled to defend an action brought by the indorsee, to recove the amount of the certificate, by setting off a debt due to th bank from the original depositor. It was recognized in that cas that such certificates have in most respects the incidents of prom issory notes, and are classed as such; but certain distinction

were pointed out between them and common promissory notes such as were contemplated by the statute. If the United States Revised Statutes forbade the issue of any other notes whatever than such as were therein authorized, it would be difficult to hold this certificate to be legal. *Miller* v. *Austen*, 13 How. 218. But assuming that it might fall within the general designation of a note, it cannot be considered as a note intended to circulate as money, within the meaning of the statute. It requires to be indorsed. It was understood not to be payable till a certain future date. It is not in a sum adapted for general circulation as money. The form of the instrument, and the incidents above mentioned, show that it was not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society. *Craig* v. *Missouri*, 4 Pet. 410, 432; *Briscoe* v. *Kentucky Bank*, 11 id. 257, 314, 318; *Virginia Coupon Cases*, 114 U. S. 269, 284. See also *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 648, where it was held that certified checks do not fall within a similar prohibition.

3. But it is urged that the issue of such certificates of deposit is not good banking, and is of itself so calculated to put a prudent investor on his guard that a trustee ought to be held responsible for any loss arising from such an investment. In respect to this objection it is to be observed, in the first place, that this method of doing business is not illegal or novel. If Congress had intended to prohibit the issue of certificates of deposit altogether, or of certificates payable on time or with interest, it would probably have said so in plain terms. The statute was passed in view of known methods of doing business. It has long been understood that the relation between a bank and its depositor is that of debtor and creditor. In England the business of banking has been carried on to a greater extent by individuals than by incorporated companies; but the ordinary relation with depositors is the same. *Carr* v. *Security Bank*, 107 Mass. 45; 9 Am. Rep. 6. It is competent for the parties to make such contract as they please respecting interest, and the time of payment of the principal. To borrow at a low rate of interest and to lend at a higher rate is not an uncommon, though not a universally approved, method of banking. Whether it is good or bad policy

for a National bank to do this, is not a matter for judicial dete mination. In *Foley* v. *Hill*, 2 H. L. Cas. 28, it was finally d termined authoritatively for England, in 1848, that the relati between a banker and his customer is the ordinary relation debtor and creditor, with a superadded obligation, arising out the custom of bankers, to honor the customer's drafts; and th this relation was not altered by an agreement by the banker allow interest on the balances in the bank. Lord Chancellor Co TENHAM said: "The money paid into the banker's is mon known by the principal to be placed there for the purpose being under the control of the banker; it is, then the banke money; he is known to deal with it as his own; he makes wh profit of it he can, which profit he retains to himself, paying ba only the principal, according to the custom of bankers in son places, or the principal and a small rate of interest, according the custom of bankers in other places." Id. 36. And Lo BROUGHAM said: "The party who receives the money has t use of it as his own, and in the using of which his trade consis and but for which no banker could exist, especially a banker wh pays interest." Id. 43. Adjudicated cases show that certificat of deposit bearing interest, or payable at a future date, have oft been before the courts, and in the absence of statutory prohib tion, they have not been deemed open to legal objection on th ground. *Miller* v. *Austen*, *supra*; *Kilgore* v. *Bulkley*, Conn. 362; *Patterson* v. *Poindexter*, 6 Watts & S. 227; Am. Dec. 554; *London Saving Fund Society* v. *Hagerstow Savings Bank*, 36 Penn. St. 498; *Cate* v. *Patterson*, 25 Mic 191; *Laughlin* v. *Marshall*, 19 Ill. 390; *Howe* v. *Hartness*, Ohio St. 449. See also 2 Dan. Neg. Inst., §§ 1698–1707 Story Prom. Notes, § 12, n.; Morse Banks, 64.

It is undoubtedly true that a bank incorporated under the a thority of this Commonwealth could not lawfully issue such ce tificates, by reason of express statutory prohibition. Pub. Stat chap. 118, § 40; Gen. Stats., chap. 57, § 63; R. S., chap. 3 § 57; Stats. 1834, chap. 203, § 1; Stats. 1828, chap. 97, § This prohibition however is subject to exceptions, in favor of th Commonwealth, of savings banks, of assignees in insolvency, counties, cities and towns, and of other banks. To all of thes

State banks may pay interest; to some of them, they may issue notes payable at a future day certain. These exceptions are sufficient to show that the insecurity of the deposits or loans was not the evil specially feared by the Legislature. By the Public Statutes (chap. 157, § 53), moneys belonging to insolvent estates must be deposited by the assignee in some bank. The Treasurer of the Commonwealth may deposit public moneys in National banks on interest. Pub. Stats., chap. 16, § 55. County treasurers must deposit surplus funds in their hands in National banks, at such rates of interest as may be practicable. Pub. Stats., chap. 23, § 18. The Revised Statutes (chap. 36, § 78) authorized savings banks to lend their deposits on interest to banks, without any expressed limit as to amount of loan or time of payment. Such limitations however have since been enacted, in various statutes, and now savings banks may deposit sums not to exceed twenty per cent of the amount of their deposits, on call, in National banks, and may receive interest for the same. See Gen. Stats., chap. 57, § 144; Stats. 1863, chap. 175, § 3; Stats. 1876, chap. 203, § 9; Stats. 1881, chap. 214, § 3; Pub. Stats., chap. 116, § 20. Since savings banks might heretofore, and may still, invest their funds, to a limited amount, in the shares of such banks (R. S., chap. 36, § 78; Gen. Stats., chap. 57, § 142; Pub. Stats., chap. 116, § 20; Stats. 1882, chap. 224), the provision that deposits may be made on call does not imply that a loan of a moderate amount to a National bank for a short term is supposed to be insecure. A legal debt from a bank, due on demand, or within a short time, may properly be considered as a security of a higher order than shares in its capital stock. There is nothing in all this legislation which calls upon us peremptorily to hold a trustee responsible for a loss incurred by reason of purchasing a certificate of deposit in a National bank, payable at a future time certain; but every such case, as it arises, must be determined on its own circumstances.

In the present case, it was found as a fact, on the testimony of two witnesses, confirmed by that of the trustee himself, that it was not and is not usual or customary for National banks to issue certificates of deposit payable at a future time, stated either on the face of the certificate or by an agreement with the payee. But during nearly a year prior to the issue of the certificate in

question, this particular bank had issued many such certific
It was a legal form of obligation. It does not appear that
practice was objected to and, indeed, it does not appear, ex
by inference from the statutory requirements, that it was kn
by the Comptroller of the Currency or the National bank ex
iner. These certificates were taken to a considerable extent
certain savings banks and trust companies. Whether these i
tutions were authorized by law to make such investments,
need not further consider. There is nothing to show that
bank was then in doubtful credit, or that any suspicion of its
solvency was entertained in the community. It is expre
found, and this finding is not open now to revision as the cas
presented to us, that the trustee purchased the certificate in g
faith. The purchase was at a rate of interest not shown to
excessive. The amount of the capital stock of the bank is
stated; it appears that it was a National bank, organized un
the laws of the United States, and doing business in Boston.
was subject to the supervision of the government officers, and
the various regulations provided in the statutes for such insti
tions. Its stock then sold at par in the market; and occasiona
about that time, at a small premium.

It has always hitherto been considered in Massachusetts t
investments of trust funds might properly be made in the sha
of banks incorporated under the authority of the Commonweal
or of the United States. Looking, as we must, simply at
circumstances of the case which is submitted to us, a majority
the court do not think the trustee ought to be held responsible
the loss on the purchase of the certificate.

4. The various matters of evidence which were objected
were competent.

Decree accordingly.

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Eaton v. Pacific National Bank.

(144 Mass. 260.)

Increase of capital — conditional subscription — recovery.

The directors of a National bank voted to increase the capital stock "to $1,000,000," and that the stockholders "have the right to take new stock at par to an equal amount to that then held by them." No subscription books were opened, and the plaintiff did not subscribe for any of the new stock, but paid the bank a sum equal to the amount of stock then held by her, taking a receipt therefor "on account of subscription to new stock." The new stock subscribed for and paid in did not amount to enough to make the capital stock $1,000,000, and the directors then voted that the capital stock be increased by the sum paid in. The Comptroller of the Currency was notified that the capital stock of the bank had been increased to that extent, and he issued a certificate authorizing the bank to carry on business with that amount of capital stock. The amount paid in, as above, was used by the bank in its general business, and lost within a month after the certificate was issued, the bank having suspended. The plaintiff demanded back the amount paid in by her. *Held*, that she was entitled to recover it, with interest from the date of her demand.

THE head-note and opinion show the facts.

J. H. Benton, Jr., for plaintiff.

A. A. Ranney, for defendant.

Field, J. This is an action of contract brought in the Superior Court, and by the defendant removed to this court, where it was tried without a jury, and reported to the full court. When the action was brought, the bank was not in the hands of a receiver, and the receiver afterward appointed has not formally intervened or appeared in the suit; but it was understood at the argument that the action was defended by him; and that he desired that it should be prosecuted for the purpose of determining the liability of the bank. See *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383; 1 Nat. Bank Cas. 77.

The case was reserved for the consideration of the full court, presumably under Pub. Stats., chap. 150, § 8. The facts have been found; and although the questions of law have not been

stated in the report, it is plainly the intention of the repor reserve the question of law whether, on the facts found, or s of them as are competent, judgment should be entered for plaintiff or defendant. We are of opinion that the reservatio within the power conferred by this section of the statutes, we consider the case as if it were reserved for judgment upon facts found, which are in the nature of a special verdict. *Terry* v. *Brightman*, 129 Mass. 535.

By the articles of the banking association, "the capital s be increased, according to the provisions of section 5142 of Revised Statutes, to any sum not exceeding $200,000," and board of directors shall have power "to provide for an incre of the capital stock of the association, and to regulate the m ner in which such increase shall be made." The vote of the rectors of September 13, 1881, to increase the capital stock $1,000,000, which was an increase of $500,000, and the su quent vote of December 13, 1881, to increase the capital stock $461,300, instead of $500,000, were therefore within the po of the board.

The case raises a question which was suggested, but not cided, in *Delano* v. *Butler*, 118 U. S. 634; 7 Sup. Ct. Rep. *ante* 163. It was there said, at page 650, that "it will be obser that without waiting to see what the future action of the asso tion and the Comptroller of the Currency might be on the qu tion of the ultimate amount of the increased stock, the plaintif error paid for his shares and accepted his certificate. This he d in legal contemplation, with knowledge of the law which auth ized the association and the Comptroller of the Currency to duce the amount of the proposed increase to a less sum than t fixed in the original proposal of the directors, and such paym and acceptance of the certificate in accordance therewith mi amount, under such circumstances, on his part, to a waiver of t right to insist that he should not be bound unless the wh amount of the proposed increase should be suscribed for and p in. But, without insisting upon that point or deciding it, think that the subsequent conduct of the plaintiff in error amou to a ratification," etc. In the present case the plaintiff paid her money, but did not accept a certificate of stock.

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To make the increase of the capital stock valid, it must be authorized in accordance with the articles of the association. The whole amount of it must be paid in. Notice thereof must be transmitted to the Comptroller, and he must certify "that it has been duly paid in as part of the capital of such association, and must approve of it." U. S. R. S., § 5142. The plaintiff therefore was compelled to pay in her money before the final action of the Comptroller, in order to become entitled to any part of the new stock. Within the maxim of the increase of capital stock provided for by the articles of association, the Comptroller could not determine the amount of the increase, except by approving, or refusing to approve, the amount authorized by and paid into the bank. The united action of the bank or its directors, of the subscribers to the new stock, and of the Comptroller, were required to effect an increase of the capital stock; and when the plaintiff paid in her money, she ran the risk that the contemplated increase of $500,000 might fail, either because it might not all be subscribed for and paid, or because the Comptroller might refuse his approval; but she did not run the risk that if it were all paid in, the Comptroller might, without any further action of the bank or its directors, reduce the amount of the increase, because he had not the lawful power to do this. If the Comptroller refused his approval, the plan failed. The directors, by a new vote, might authorize another and a different increase of the capital stock, which if the amount was paid in, and the Comptroller approved of it, would become an actual increase of capital stock. But this would be an abandonment of the first plan by the bank, and the adoption of another.

Upon the ordinary principles of contract, if the plaintiff paid in her money for forty shares on the condition of five thousand shares of stock should be created, she could not be bound to take the forty shares if the condition was not performed. If there was such a condition, the plaintiff could not be required to take forty shares if the condition was not performed. If there was such a condition, the plaintiff could not be required to take forty shares out of four thousand six hundred and thirteen shares, which the bank by a subsequent vote authorized, unless there is something in the facts which shows that the amount of stock to

be created was immaterial, or unless she assented to the chang or her assent is to be implied, or unless, on grounds of pub policy and the rights of creditors, she cannot be permitted withdraw her money after the Comptroller has certified that certain amount has been paid in for an increase of the capit stock, which amount included the sum she had paid.

Whether the plaintiff shall become the owner of forty out four thousand six hundred and thirteen shares cannot be regard as immaterial, particularly in a corporation where the stockhol ers are liable to an assessment to the amount of the stock held each to supply a deficiency in the capital stock (U. S. R. § 5203), and are also held "individually responsible, equally a ratably, and not one for the other, for all contracts, debts and e gagements of such association, to the extent of the amount their stock therein, at the par value, in addition to the amou invested in such shares." U. S. R. S., § 5151.

Neither can we perceive any sound reason why, in legal conte plation, she must be held to have assented to the change wherel the amount of the contemplated increase was reduced to $461,30 She paid in her money under a vote whereby the capital sto was to be increased by $500,000. If this amount was not pa in, or the Comptroller did not approve of this increase, there w an end of the proposition which had been voted, and which s and the bank had in contemplation when she paid in her mone If the directors of the bank, after she paid in her money, aba doned their original vote, and passed another vote for an increa different in amount, it is difficult to see how she was bound by They were not her agents. The new vote was not passed furtherance of the original proposition to make the increa $500,000. "The vote was not a reduction of the capital sto of the bank, because the increase had not then been made," and t capital stock of a banking association can only be reduced by vote of the stockholders. U. S. R. S., § 5143. To make the i crease of the capital stock $461,300, instead of $500,000, was sentially a new proposition, authorized for the first time on D cember 13, 1881, nearly two months and a half after the plaint paid in her money.

On the facts found, the intention of the directors and the Comptroller is apparent. The bank failed November 18, 1881, and before this, $461,300 had been paid into the bank for new stock to be created under the vote passed September 13, 1881. It was not likely that any more money would be paid in for this purpose after the failure of the bank. The bank had received this money and had used and lost it. On its failure a bank examiner took possession of the bank and its assets, and remained in possession until March 18, 1882. While its assets were in the possession of the bank examiner, it was decided to make this $461,300 a part of the capital stock of the bank. It would then cease to be a debt of the bank, and the creditors of this sum, having thus been made stockholders, would then be liable to an assessment to an equal amount to supply the deficiency of capital stock, and would also be liable to pay another equal amount to satisfy the debts of the bank. The directors accordingly passed the vote of December 13, 1881, which in form is a reduction of the capital stock by the sum of $38,700, but in fact is a vote authorizing the increase of the capital stock by $461,300; and they attempted to apply the money paid in under the previous vote to this new increase which they had voted, and then voted that the Comptroller of the Currency be notified that the capital had been increased by this sum, and that the whole amount had been paid in, and they requested the Comptroller to issue his certificate. The cashier on the same day sent to the Comptroller a copy of the foregoing votes, and his certificate that the capital had been increased by the sum of $461,300, all of which had been paid in. The copy of the votes sent to the Comptroller informed him that the attempt to obtain $500,000 for an increase of the capital stock had failed, and because it had failed, that the directors had fixed the amount of the increase at $461,300, and had declared the money paid in under the previous vote as paid in for the new stock voted on December 13. The Comptroller of the Currency on December 16, 1881, issued the usual certificate approving of "said increase of capital stock" to the amount of $461,300, and on the same day sent to the bank a notice that its entire capital stock, including the increase he had just then approved, having been lost, an assessment of one hundred per cent must be laid upon

the shareholders, otherwise the bank must go into liquidation or a receiver must be appointed, according to the Revised Statutes of the United States, section 5234.

It is argued that the certificate of the Comptroller is conclusive on the plaintiff that the sum of $461,300 was actually paid in as an increase of capital stock, and that this includes the amount she paid. Undoubtedly the public in dealing with the bank do rely to some extent upon the certificate by the Comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and so long as the certificate remains unrevoked, it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false, it is probable that an assessment could be laid upon the shareholders to make up the deficiency in the capital stock. But that the certificate of the Comptroller makes any one a shareholder who is not one, or enables the bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that immediately after the vote of December 13, 1881, the plaintiff could have treated the original vote as abandoned, and could have demanded her money and brought and maintained an action to recover it, the action of the directors and of the Comptroller in erroneously including the amount she had paid in the amount which has been paid in to increase the capital stock by $461,300, cannot affect her legal relations with the bank unless she has assented to or ratified that action, or is estopped by her conduct, or has been guilty of laches. As she demanded payment on January 10, 1882, of the money she had paid, she is not guilty of laches, and it is not contended that there is any estoppel, and it is plain that there is no evidence of actual assent or ratification.

The defendant denies that it was the contract between it and the plaintiff that she should receive forty shares out of five thousand shares of new stock, and says that the contract was that she should receive forty shares of new stock, and that there was no condition attached to the contract that the capital stock should be increased by $500,000. This objection is fundamental. The

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plaintiff did not subscribe for stock, but paid in her money in pursuance of the vote of September 13, 1881, and she took a receipt. There is no express condition; but construing the receipt in connection with the vote, it is plain that she paid in her money for forty shares of the new stock voted on September 13.

In *Warwick R. Co.* v. *Cady*, 11 R. I. 131, 137, it is said that "if the charter had provided for a definite capital, or if by the general law provision had been made that the enterprise should not be commenced until some definite proportion or amount should be subscribed, * * * or if before subscription the capital had been fixed by vote or agreement, then it might well be held that the raising the whole amount was a condition of the subscription. And so also if the amount was named in the paper subscribed." This statement of the law is supported by our own decisions and many others. *Katama Land Co.* v. *Jernegan*, 126 Mass. 155; *Troy & G. R. Co.* v. *Newton*, 8 Gray, 596; *Atlantic Cotton Mills* v. *Abbott*, 9 Cush. 423; *People's Ferry Co.* v. *Balch*, 8 Gray, 303; *Cabot & West Springfield Bridge Co.* v. *Chapin*, 6 Cush. 50; *Central Turnpike Corp.* v. *Valentine*, 10 Pick. 142; *Salem Mill-dam Corp.* v. *Ropes*, 6 id. 23, and 9 id. 187; *Read* v. *Memphis G. G. Co.*, 9 Heisk. 545; *Santa Cruz R. Co.* v. *Schwartz*, 53 Cal. 106; *Hughes* v. *Antietam Manuf'g Co.*, 34 Md. 316; *Ridgefield & N. Y. R. Co.* v. *Brush*, 43 Conn. 86; *Ticonic Water Power and Manuf'g Co.* v. *Lang*, 63 Me. 480; *Lewey's Island R. Co.* v. *Bolton*, 48 id. 451; *Pitchford* v. *Davis*, 5 M. & W. 2; *Allman* v. *Havana R. & E. R. Co.*, 88 Ill. 521; *Memphis B. R. Co.* v. *Sullivan*, 57 Ga. 240; *Peoria & R. I. Co.* v. *Preston*, 35 Iowa, 115; *Contoocook Val. R. Co.* v. *Barker*, 32 N. H. 363; *Peirce* v. *Jersey Water-works Co.*, L. R., 5 Exch. 209; *Norwich & L. Nav. Co.* v. *Theobald*, Moody & M. 151.

If however the amount of the capital stock is left indefinite, or the maximum and minimum of the amount only are defined, with the right in the corporators or directors subsequently to determine the amount, a subscription to stock must be deemed absolute, unless there is an express condition inserted in the subscription, or unless a sufficient amount is not subscribed to enable the corporation legally to organize. *Boston, B. & G. R. Co.* v.

Wellington, 113 Mass. 79; *Penobscot & Kennebec R. Co.* *Bartlett*, 12 Gray, 244; *Boston & A. R. Co.* v. *Pearson*, 1 Mass. 445.

A subscription to an increase of capital stock manifestly diff from a subscription to the original stock, in this: that the su scriber is dealing with a corporation already organized and doi business, and it has been said that there is no implied conditi that the whole number of the new shares created should be su scribed for or issued. But whether there is an implied conditi attached to a subscription for new stock, depends upon the c tract of subscription, construed with reference to the la and the facts under which it is made, and this is to be determin in the same manner, and upon the same principles, in subscr tions for new stock as in subscriptions for original stock. In common case of a corporation authorized to create new stock a vote of its stockholders or directors, the stock is created the vote. In the absence of any statute prescribing how it sh be disposed of, it may be allotted among the stockholders, or may be sold from time to time as the corporation needs mon It may be sold by subscription, and the stockholders may be titled to a preference in subscribing, and they may sell th rights. If the law requires that the new stock be paid for at p before it is issued, this must of course be done, but, unless a st ute or by-law requires that the new stock shall all be subscrib for before it is created or issued, there is no implied condition th all the stock created shall be subscribed for or issued. The crease of the capital stock is fixed by the vote, and the corporati is left to dispose of the new stock as it can, according to la *Nutter* v. *Lexington & W. C. R. Co.*, 6 Gray, 85.

But, in the case at bar, the provisions of the statutes of t United States, relating to an increase of the capital stock are ev more strict than those relating to the original stock. An assoc tion may be authorized to commence business when fifty-six p cent of the capital stock has been paid in (U. S. R. S., § 5140 but there can be no increase in the capital stock until the wh amount of the increase has been paid. U. S. R. S., § 5142. T vote of the directors of September 13, 1881, was, we think, in t nature of a proposal to the stockholders to subscribe for five tho

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and shares of new stock, and to pay in for it $500,000. The stock must all be taken, and the money paid in, before the new stock could be created. It was a condition precedent to the issue of the new stock, under this vote, that both these things should be done, and that the Comptroller should certify that they had been done, and approve of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in, and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created.

The result is that the plaintiff is entitled to judgment for $4,000, with interest from January 10, 1882, the date of her demand.

So ordered.

CORCORAN v. BATCHELDER.

(147 Mass. 541.)

Loans — excessive — right to collect — evidence.

The prohibition of U. S. R. S., § 5200, that the total liabilities of any National bank to any person, company, corporation or firm for money borrowed, including in them "the liabilities of the several members thereof, shall at no time exceed one-tenth part" of the capital stock actually paid in, does not prevent a bank from recovering of a person to whom it has lent a sum greater than ten per cent of its capital stock, the excess of the loan over such limit.

In an action on promissory notes by the receiver of a bank, where defendant alleged that he deposited with the bank as collateral security one hundred and seventy-three shares of stock of the Erie Tel. & T. Co., it appeared that defendant and another were authorized to consult with the Comptroller of the Currency in regard to the affairs of the bank, and that afterward defendant entered on each note in suit, "Secured by 173 shares Erie Tel. & T. Co." *Held*, that conversations between the committee and the Comptroller were admissible to show that this was done in good faith, and by the instructions of the Comptroller, but that it was incompetent for defendant to testify in his own favor as to what was said about collateral security and the condition of some of the notes in the bank so secured.

A personal letter written by defendant, which contained statements as to his financial relations with the bank, was properly excluded, when offered by him.

Corcoran v. Batchelder.

EXCEPTIONS from the Superior Court of Worcester county.

Mason, J. Two actions of contract by John W. Corcoran, receiver of the Lancaster National Bank, against Wesley R. Batchelder, upon three several promissory notes, two of which, in the first action, for $1,500 each, signed by the defendant in his own name, and one for $3,000, in the second action, signed "Whithed & Co.," were given to the Lancaster National Bank. At the trial there was evidence that one William H. McNeil, referred to in the opinion, was president of said bank, but had become a defaulter, and left the country; and the letter to one Paige, referred to by the court in its opinion, was written by the defendant to Paige after the former had been to Washington to see the Comptroller of the Currency in relation to the affairs of the bank and contained statements as to the defendant's financial relations with said bank. The jury found for the plaintiff in each action and the defendant excepted.

P. A. Collins, *J. W. Corcoran* and *H. Parker*, for plaintiff.

B. F. Butler and *F. L. Washburn*, for defendant.

Morton, C. J. Many exceptions were taken at the trial, which are waived by the defendant. We shall consider only those which he now relies upon. The suits are brought upon several promissory notes, amounting to $6,000, given by the defendant to the Lancaster National Bank of Clinton, of which the plaintiff is the receiver. The principal defense set up in the answers and in the declarations in set-off is that the defendant deposited with the bank, as collateral security for the notes, one hundred and seventy three shares of the capital stock of the Erie Telegraph and Telephone Company, which was of greater value, and which the bank had sold and appropriated to its own use.

1. It appeared that the capital of the bank was $100,000, and that at the time when it failed, and when the plaintiff was appointed receiver, the defendant owed the bank for borrowed money the sum of $15,200, including the notes in suit, and that the defendant has paid $9,200 of this amount. The defendant asked the court to rule that under section 5200 of the Revised Statutes of the United States, "the defendant could not, in any event, be lia

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ble to said bank for more than the sum of $10,000 at any one time, and that there never having been a greater liability than $10,000, which was ten per cent of the whole capital stock of the bank, the plaintiff could not recover more than $800 and interest thereon, on these suits or either of them." The court rightly refused this ruling, even if this defense is open to the defendant under the pleadings. It has been held by the Supreme Court of the United States that the prohibition in section 5200 of the Revised Statutes of the United States does not prevent a bank from recovering of a person to whom it has lent a sum greater than ten per cent of its capital stock the excess of the loan over the limit of ten per cent. That decision is binding upon us. *Mining Co.* v. *Bank*, 96 U. S. 640; 1 Nat. Bank Cas. 151.

2. The defendant objected to the depositions of McNeil, on the ground that they were not seasonably filed under the tenth rule of the Superior Court. They were not filed within fourteen days of the time they were opened as required by the first part of that rule, but the rule further provides that "if by accident or unforeseen cause the party shall be prevented from filing his deposition within fourteen days, the court may order it to be filed afterward, on motion and sufficient cause shown." It appeared at the trial that the counsel for the plaintiff filed the depositions on the fifteenth day after they were opened, and that he supposed that it was within the fourteen days under the rule. It was competent for the presiding justice to find that the failure to file them within the rule was caused by accident, and he had the right to order them to be filed within his discretion, which we cannot revise.

3. It appeared that the defendant and Hosmer were authorized by the directors of the bank to go to Washington as a committee to consult with the Comptroller of the Currency in regard to the affairs of the bank, and that on his return the defendant, in the presence of the directors, entered on each of the notes in such a statement that it was "secured by one hundred seventy-three (173) shares Erie Tel. & T. Co." In order to show that he did this in good faith, it was competent for him to show that it was done by the instructions and advice of the Comptroller. To this extent the court admitted the conversation between the committee and the Comptroller. The defendant contends that he had the right

to put in all that was said and done between the committee a the Comptroller, and the defendant was asked as a witness, substance, what was said about collateral security, and about t condition of some of the notes of the bank, secured by collater including his own. The court excluded the question. It was n competent for the defendant to put in his own declarations in l own favor. The exceptions do not show that any thing else w excluded by the ruling. They do not show what the declaratio or statements sought to be put in were, and therefore fail to sho that any testimony which was relevant or material was exclude

4. The private letter written by the defendant to Paige w properly excluded under the rule that a party cannot put in l own acts and declarations in the country in support of his case.

5. The instructions given to the jury upon the question of t authority of the president to receive the collateral security for t bank seem to be substantially correct, but we need not consid them in detail, as the special finding of the jury has rendered the immaterial. The question put to the jury was: "Did the defen ant deliver one hundred and seventy-three shares of the Erie Tel graph and Telephone Company stock to the Lancaster Nation Bank of Clinton?" which the jury answered in the negativ The main issue of fact in the case was whether the defendant d livered the stock to McNeil as president of the bank and for th bank, or to McNeil for his personal use and convenience, furtherance of private speculations in which he (the defendan and others were embarked. Under the instructions given the it is entirely clear that the jury understood the finding to mea that the stock was not delivered to McNeil for the bank. Th defendant now contends that the question was misleading, as it le the jury "to suppose that the stock must have been placed withi the walls of the bank." He made no objection at the time, and is too late now to object to the form of the question. But no on can read the bill of exception without being convinced that it impossible that intelligent men could be misled in the manner sug gested by the defendant. It is clear that the jury understoo the question, and answered it intelligently.

Exceptions overruled.

Richards v. Attleborough National Bank.

(148 Mass. 197.)

Officers — liquidation — stockholders as directors.

Under the act of Congress, July 12, 1882, extending for the purpose of liquidation the franchises of such National banking associations as do not extend the periods of their charters, and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation. But after the expiration of the term of its charter, the stock of such an association is not transferable so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder, is ineligible as a director, under U. S. R. S., § 5145.

REPORT from the Superior Court of Bristol county. John Lathrop, J. Action by Josiah D. Richards against the Attleborough National Bank, upon an award. The court found for defendant and at the request of plaintiff reported the case to this court.

Edward Avery and *J. E. Pond*, for plaintiff.

E. H. & S. C. Bennett, for defendant.

Devens, J. The Attleborough Bank was organized July 17, 1865, and by law was to have successions for the period of twenty years from its organization. As the law then stood, its existence as a legal entity would have ended on July 17, 1885. Previous to the expiration of this time, on July 12, 1882, the United States statute of that date was enacted, the principal object of which was to enable the associations formed under the United States Banking Law to prolong their corporate existence for an additional period. The seventh section of the act applied to such associations as did not desire to avail themselves of this privilege, enabled them to continue their business in the ordinary way until the twenty years had expired, and then provided a mode by which their affairs should be finally closed, which was by extending their franchise for this sole purpose. This extension necessarily implies a

continuance of their corporate existence, although with stric limited powers. The section is as follows:

"That National banking associations whose corporate existence has expi or shall hereafter expire, and which do not avail themselves of the provisi of this act, shall be required to comply with the provisions of sections 5221 5222 of the Revised Statutes, in the same manner as if the shareholders had vo to go into liquidation, as provided in section 5220 of the Revised Statutes, and provision of sections 5224 and 5225 of the Revised Statutes shall also be applica to such associations, except as modified by this act, and the franchise of s associations is hereby extended for the sole purpose of liquidating their fairs, until such affairs are finally closed."

The defendant bank took all necessary steps to avail itself the provisions of this section, and of the sections of the Revi Statutes referred to therein (which need not be more particula recited), having determined to close its business, and not to av itself of the right to continue it for the additional term of twe years.

It is the contention of the plaintiff that at the expiration of twenty years the corporation, as such, was wholly dissolved; t it had a nominal existence by virtue of its charter, for the p pose of closing its affairs; that it could not elect officers or dire ors, but could simply appoint agents to liquidate its affairs, failing to do this, that its directors, as they existed at the exp tion of the twenty years, could close its affairs with the powers liquidating agents. How such agents could be appointed chosen he does not point out, unless by a meeting of the sto holders, called by virtue of the corporate powers. This cont tion therefore is, in substance, that as the corporation is utte dissolved, those who as directors find themselves in possession the assets may manage them at their own discretion. The ri to elect directors and such other officers as are usually chosen a business corporation is part of the corporate franchise. W the franchise is extended, although for a limited purpose, corporation may exercise all the powers originally conferred u it which are appropriate for that purpose, among which is the e tion of directors. The right to manage its own affairs in clos them belongs to the bank, through the stockholders, and not those who by accident are found as directors in possession. T act to be done has been compared by Mr. Justice Morton to

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administration of an estate. *Crease* v. *Babcock*, 23 Pick. 334; 34 Am. Dec. 61. No doubt it could have been provided that the president of the bank or the directors last in office might perform it, but it has been deemed wiser to prolong the corporate existence, or to use the exact words of the statute, to extend the franchise. Were full force indeed to be given to the plaintiff's contention, and were the corporation to be held to be actually dissolved, it would be fatal to his suit for whatever remedies might exist against stockholders or against the property for merely belonging to the corporation. No judgment could certainly be rendered against a non-existent corporation any more than against a deceased person. *Bank* v. *Colby*, 21 Wall. 609, 615; *Thornton* v. *Railroad Co.*, 123 Mass. 32. The corporation can however sue and be sued still as an existing corporation. *Bank* v. *Insurance Co.*, 104 U. S. 54. In the liquidation of its affairs the stockholders must have the right, through proper officers elected by them, to direct the prosecution of the settlement of suits.

At the time of the expiration of the twenty years — July 17, 1885 — a board of directors, of which the plaintiff was president, was in existence. There was no election on January 11, 1886, the day fixed by the articles of association, and no meeting was called or notified for that purpose. The United States Revised Statutes, section 5145, provide:

"The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking, and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified."

During the years 1885 and 1886 these directors continued to settle the affairs of the bank, and made dividends from its assets to the stockholders, amounting in all to one hundred and fifty-eight per cent on the capital stock. In thus proceeding to wind up the affairs of the bank they were in the exercise of their proper duty, nor was any objection made on behalf of the stockholders until after December 14, 1886, when the directors entered into a submission on behalf of the bank to arbitrators of a claim made by the plaintiff against it. As they were lawfully engaged

in winding up the affairs of the bank, such a submission was wit
their powers. *Canal Co.* v. *Swann*, 5 How. 83, 85. Nor
we think this submission was invalidated by the presence of
plaintiff, as it was made by a unanimous vote of the directors.
arbitrators met, took testimony in the matter, the plaintiff hav
then resigned from the board of directors, and on February
1887, rendered an award, which is that declared on. On January
1887, at a meeting of stockholders, five other persons were cho
as directors, who, after organizing by the choice of E. Ira Ri
ards as president, voted to revoke the submission of Decem
14, 1886. A notice to this effect, and a copy of this vote, w
on the same day sent to the arbitrators, signed by J. H. Peckh
a director then chosen as clerk. On January 13, 1887, a no
of revocation of the submission was signed by E. Ira Richard
president, and sealed with a common paper seal as the seal of
bank, and was sent to the arbitrators, who had at that time he
the evidence, but had not agreed on the amount of the award.

Unless there was a legal election of a new board of direct
the old board was not displaced, nor could its action in enter
upon a submission have been revoked. The questions whet
the cashier by whom the stockholders' meeting was notified co
properly have given this notice, whether the proceedings
the meeting itself were regular, and whether the attempted
vocation of the submission was formally made and properly n
fied to the arbitrators, have all been fully argued. We shall
have occasion to discuss these, because in our view three of
persons who constituted a majority of the new board, and with
whom it could have no legal existence, were not eligible (not
ing stockholders) as directors, and were not made so by the
tempted transfer of stock to them. Every director must own
least ten shares of stock in his own right in the association
which he is a director. If he ceases to own them, he becor
disqualified, and his place is to be vacated. U. S. R.
§ 5146. This qualification is not dispensed with when
franchise is extended merely to close the affairs of the bank.
the stock ceased to be negotiable as such when the bank had
further right to do the business for which it was organized, a
if a stockholder could no longer make another member of

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corporation liable, relieving himself from his responsibilities as such, and imposing these upon another, as well as giving to another the full rights of a stockholder, it would follow that while stockholders might continue to choose directors, the right to vote and the choice would necessarily be limited to those who were stockholders at the time when the liquidation commenced.

The seventh section of the act of 1882, heretofore quoted, makes sections 5221 and 5222 of the Revised Statutes, which relate respectively to the notice to be given and the deposit of money to redeem circulation, and sections 5224 and 5225, which relate to the reassignment of bonds, and redemption and destruction of notes, applicable so far as they may appropriately be so, to any bank closing its affairs by virtue of that section, as if the stockholders had voted to go into voluntary liquidation under section 5220. That when a corporation is dissolved and absolutely ceases to exist, there can be no transfer of stock as such, would, we presume, be conceded. When liquidation commences all that is left to the stockholder is the right to a share in the assets, or the sum produced therefrom, proportional to his holding; while in the case of National banks he is subjected to a limited proportional liability for the debts the bank may have incurred. The equitable interest which he may have in the funds held by trustees, directors or receiver settling the affairs of the corporation on behalf of the stockholders may be assigned subject to the rights of creditors, or the claims of the bank upon them; but such equitable assignee does not become a stockholder. When, after the expiration of the term for which the bank was chartered to do business, its existence is prolonged and "its franchise extended," simply to collect its dues, pay its debts, and divide what remains among its shareholders, the same result must follow. *Crease* v. *Babcock*, *supra*. The reasons for making the stock, as such, transferable, and allowing the purchaser, by virtue of his purchase, to become a member of the corporation, cease to exist when there is no profit to be made, no business to be done, and when the property of the bank and its liabilities are fixed, and nothing remains but the adjustment of these. Whether the liquidation of the affairs of the bank be voluntary or involuntary, or whether it proceeds under the authority given to continue in existence in

order to close its affairs, it is necessarily implied that the resp tive rights, not only of the creditors and debtors of the bank, of the stockholders, are to be determined as of the time w it commences. Indeed were the stock as such to continue tr ferable, serious embarrassments would arise. Where stock is in the ordinary course of business, and so transferred, it is important to the purchase whether the bank has or has not cla against the stockholder so transferring stock. But when the b is in liquidation, and when all to which the stockholder is enti is his proportion of the assets, the claims which the bank hold against him are a proper offset to those which he may b against it by virtue of his ownership of stock. He cannot th fore place another in the position of a stockholder, even if may invest him with such rights as he himself equitably have. Again, the responsibilities of a stockholder in a Nati bank are serious. Section 5151 provides:

"The shareholders of every National banking association shall be held dividually responsible, equally and ratably, and not one for another, for contracts, debts and engagements of such association, to the extent of amount of their stock therein, at the par value thereof, in addition to amount invested in such shares. * * * "

When any banking association shall have gone into liquidat under the provisions of section 5220, this liability may be enfor by any creditor of the association by bill in equity in the nature creditors' bill. *Richmond* v. *Irons*, 121 U. S. 27, 54; *ante* 2

While the transfer of the stock in a National bank, hones made while the bank is in operation, will substitute the transfe for the original stockholder, relieving the latter from his respo bilities, and imposing them on the purchaser, it has often b held that if such transfer were made to an irresponsible pers with a view of avoiding liability, and with knowledge that the b was in failing circumstances, it was a fraud, and the party t transferring would be held to all the obligations of a stockhol *Bank* v. *Case*, 99 U. S. 628; 2 Nat. Bank Cas. 25; *Bowden* v. *Jo son*, 107 id. 251; *ante* 55. When a bank is in liquidation liability of the stockholder for the debts of the corporation has b fixed. If there is a debt due from the bank, he cannot transfer liability to pay that debt to any one else, so as to affect the credi

or subject him, in seeking such remedies as he may have against the stockholders, to any examination beyond the list of those who were so when the liquidation commenced. No further debts can be contracted thereafter, nor any transactions made except such as result by implication from the duty of closing up its affairs. While the embarrassments that would arise from holding the stock of a bank transferable after it has once gone into liquidation are manifest, no reason incidental thereto exists why it should so continue. In the case at bar, when the transfer of stock on which defendant relies took place, the affairs of the bank had been nearly closed; one hundred and fifty-eight per cent had been paid on the stock, and only a relatively small sum remained to be divided. As the right to elect directors was in our view confined to those who were stockholders when the liquidation commenced, and as only such could be elected, it follows that there was no valid election of a new board of directors (three of those chosen being ineligible), and therefore no valid revocation of the submission to arbitration of the plaintiff's claim.

By the terms of the report there should be judgment on the award.

People v. Fonda.

(62 Mich. 401.)

Jurisdiction — embezzlement.

State courts have no jurisdiction of the offense of embezzlement of the funds of a National bank.

ERROR to St. Joseph circuit.

The Attorney-General, for the people.

Edwin F. Conely, *Orris P. Coffinberry* and *Chamberlain & Guise*, for defendant and appellant.

Sherwood, J. The complaint against the respondent in this case is criminal, and was made by Charles W. Cond, president of

the Farmers' National Bank of Constantine, in behalf of the ba for the larceny and embezzlement of its funds, while the respo ent was engaged in its employment as clerk or servant. T Farmers' National Bank of Constantine, at the time the alleg crime was committed, was "an incorporated banking institut organized and existing under the laws of the United States p viding for the creation of National banking associations."

The information against respondent contains nine counts, up two of which (the third and fourth) he was tried and convicted the offense stated therein, in the St. Joseph circuit, at the October term, and was, upon such conviction, sentenced to i prisonment at Jackson for the period of three years and six mont The case is now before us for review in error. The counts up which the conviction was had will be found in the margin.*

*"*Third count.* And the said prosecuting attorney, who prosecutes as aforesaid, ther gives the said court here to understand and be informed that Charles W. Fon late of the township of Constantine, in the county of St. Joseph aforesaid, on the day of January, A. D. 1881, at the village of Constantine, in the county aforesaid, be then and there a servant and clerk of the Farmers' National Bank of Constantine, Mi gan, 'an incorporated banking institution, organized and existing under the laws the United States providing for the creation of National banking associations,' and being then and there an apprentice, nor other person under the age of sixteen ye did, by virtue of his said employment, then and there, and while he was a servant clerk as aforesaid, receive and take into his possession certain money, to a la amount, to the amount of $2,000, and of the value of $2,000, of the property of the Farmers' National Bank of Constantine, Michigan, and which said money came to possession of the said Charles W. Fonda by virtue of said employment; and the money then and there fraudulently and feloniously did embezzle and convert to own use, without the consent of the said Farmers' National Bank of Constanti Michigan, his said employer; and the said Charles W. Fonda then and there, in man and form aforesaid, the said money, the property of the said Farmers' National Bank Constantine, Michigan, his said employer, from the said Farmers' National Bank Constantine, Michigan, feloniously did steal, take and carry away, against the form the statute in such case made and provided, and against the peace and dignity of people of the State of Michigan.

"*Fourth count.* And the said prosecuting attorney, who prosecutes as aforesaid, ther gives the said court here to understand and be informed that Charles W. Fon late of the township of Constantine, in the county of St. Joseph aforesaid, on the day of December, A. D. 1880, at the village of Constantine, in the county aforesa being then and there a servant and clerk of the Farmers' National Bank of Const tine, Michigan, 'an incorporated banking institution, organized and existing un the laws of the United States providing for the creation of National banking asso tions,' and not being then and there an apprentice, nor other person under the age sixteen years, did, by virtue of his said employment, then and there, and while he a servant and clerk as aforesaid, receive and take into his possession certain money a large amount, to the amount of $1,000, and of the value of $1,000, of the property the said Farmers' National Bank of Constantine, Michigan, and which said money ca to the possession of the said Charles W. Fonda by virtue of said employment; and said money then and there fraudulently and feloniously did embezzle and convert his own use, without the consent of the said Farmers' National Bank of Constanti

The statute under which the conviction was had at the circuit reads as follows:

"If any officer, agent, clerk or servant of any incorporated company, or of any city, township, incorporated town or village, school district or other public or municipal corporation; or if any clerk, agent or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years — shall embezzle, or fraudulently dispose of, or convert to his own use, or shall take or secrete with intent to embezzle and to convert to his own use without the consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny." How. Stat., § 9151.

The statute was passed by the Legislature prior to the National banking system, and could not therefore have special reference to the National legislation creating that system, however clearly the crime of the respondent may be described in the statute. R. S. 1838, p. 630, § 27; id. 1846, p. 666, § 29. At the time the alleged act of embezzlement was committed the respondent was in the bank, and in its service as clerk.

The question raised in this case is: The Federal government having declared the act charged against this respondent a criminal offense, and provided for the apprehension, trial and conviction of the offender under its laws, had the State court any jurisdiction, concurrent or otherwise, to deal with the respondent under the State statute making the same act criminal, and providing for its punishment? The learned counsel for the respondent claim that the jurisdiction of the Federal court in the case is complete and exclusive; that the offense charged in the information is for the violation of a Federal law, and that the punishment therefor has become fixed and established, and the whole subject has been covered by the legislation of Congress.

The Constitution of the United States provides as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitu-

Michigan, his said employer; and the said Charles W. Fonda then and there, in manner and form aforesaid, the said money, the property of the said Farmers' National Bank of Constantine, Michigan, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

tion or laws of any State to the contrary notwithstanding." Const. U. art. 6.

The statute passed by Congress punishing the offense charg in the information is as follows:

"Every president, director, cashier, teller, clerk or agent of any associati who embezzles, abstracts or willfully misapplies any of the moneys, funds credits of the association; or who, without authority from the directors, iss or puts in circulation any of the notes of the association, or who, without s authority, issues or puts forth any certificate of deposit, draws any orde bill of exchange, makes any acceptance, signs any note, bond, draft, bill of change, mortgage, judgment or decree; or who makes any false entry in book, report or statement of the association, with intent, in either case, to jure or defraud the association or any other company, body politic or corpor or any individual person, or to deceive any officer of the association, or agent appointed to examine the affairs of any such association; and every per who, with like intent, aids or abets any officer, clerk or agent in any violat of this section — shall be deemed guilty of a misdemeanor, and shall be prisoned not less than five years, nor more than ten."

An examination of this statute, I think, must convince any c that the offense described in this information is clearly defin therein, and falls within the scope of the act, and within the risdiction of the Federal court, and if that jurisdiction is exclus in the case, but little remains to be said — if it is, the convicti cannot be maintained.

Is the jurisdiction concurrent with that of the State? is t only remaining question. Section 711 of chapter 12 of the R vised Statutes of the United States provides that —

"The jurisdiction vested in the courts of the United States in the cases proceedings hereinafter mentioned shall be exclusive of the courts of the s eral States. *First*, of all crimes and offenses cognizable under the autho of the United States."

The other clauses of the section need not be given, as none them relate to criminal jurisdiction. Congress by law creat the National banking system, and provided for their internal wo ings, and prescribed a punishment for the offenses charged agai the respondent. U. S. R. S., tit. 62.

It seems to me, clearly the case is one falling within the pa graph of section 711 above quoted, and that by the Federal l itself the jurisdiction of the State is expressly excluded. Ch cellor Kent, in his Commentaries, in concluding his discussion the matter, says: "In judicial matters the concurrent jurisdicti

of the State tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matters can constitutionally be made cognizable in Federal courts; and that, without an express provision to the contrary, the State courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matters." 1 Kent Com. 400. And there are other authorities to the same effect. *Delafield* v. *State*, 2 Hill, 159; *Houston* v. *Moore*, 5 Wheat. 22; *Harlan* v. *People*, 1 Doug. (Mich.) 207; *Snoddy* v. *Howard*, 51 Ind. 411; 19 Am. Rep. 738; *Hendrick's Case*, 5 Leigh, 713; *Hall's Case*, 97 Mass. 570.

It is also held that in cases to which the jurisdiction of the State courts might extend, in the absence of any action by Congress, where Congress does assume jurisdiction, its control then becomes paramount and exclusive. *The Moses Taylor*, 4 Wall. 411; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Houghton*, 7 Fed. Rep. 657; *Brown* v. *U. S.*, 14 Am. Law Reg. 566; *Sturges* v. *Crowninshield*, 4 Wheat. 139; *Prigg* v. *Com.*, 16 Pet. 539; *Martin* v. *Hunter*, 1 Wheat. 304; *Houston* v. *Moore*, 5 id. 1; *State* v. *Pike*, 15 N. H. 83; *State* v. *Adams*, 4 Blackf. 146; *Com.* v. *Fuller*, 8 Metc. 313; 41 Am. Dec. 509; *Com.* v. *Tenney*, 97 Mass. 50; *Com.* v. *Felton*, 101 id. 204; 1 Nat. Bank Cas. 573; *People* v. *Kelly*, 38 Cal. 145; 99 Am. Dec. 360; 3 Story Const. Law, 623.

Com. v. *Felton* states the conclusion of the matter in that case in language quite applicable to the present. The respondent was charged in that case with being an accessory to an embezzlement by an officer of a National bank In delivering the opinion of the court Mr. Justice AMES said: "The difficulty in the way of holding the defendant upon the present indictment is that the act of Congress has taken the crime of the principal out of our jurisdiction, and our courts cannot deal with him upon that charge."

As the case comes to us upon this record, I do not think the judgment should be allowed to stand. The Circuit Court was without jurisdiction.

The judgment must be reversed, and prisoner discharged.

CAMPBELL, C. J., and CHAMPLIN, J., concurred; MORSE, J. concurred in the result.

FIRST NATIONAL BANK OF ROCHESTER v. PIERSON.

(24 Minn. 140; 31 Am. Rep. 342.)

Promissory notes—power to deal in.

A National bank has no power to deal or speculate in promissory notes, or acquire title thereto, except by discount.*

ACTION by a National bank upon a promissory note. The opinion states the facts. The defendant had judgment.

Jones & Gove, for appellant.

Charles C. Willson, for respondent.

CORNELL, J. It is expressly found as a fact by a District Court, before whom this case was tried without a jury, "that the transaction under which the plaintiff claimed to have acquired the note in question was a purchase, and not a discount, or lending of money on the credit of it;" and we have no hesitation in saying, that upon the evidence, we fully concur with the court that such was undoubtedly the real nature of the transaction as intended by the parties thereto. As a conclusion of law from this finding the court held "that the plaintiff, a National banking corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did not in law acquire, by the supposed purchase, any title to the note in question, and cannot recover upon it in this action."

Upon the fact, as thus found, it will be seen that the only question presented is whether a National bank, created and o

*See National Pemberton Bank v. Porter, 125 Mass. 333; 28 Am. Rep. 235; 2 Nat. Bank Cas. 266.

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ganized under the act of Congress "to provide a National currency," etc., is authorized to deal or traffic in promissory notes as a species of personal property, or to acquire any title to such paper by a purchase made admittedly not in the way of discount, or by lending money on the credit of it.

In the case of *Farmers & Mechanics' Bank* v. *Baldwin*, 23 Minn. 198; 23 Am. Rep. 683, it was expressly held that no power of this character is conferred by law of this State, which authorizes State banks, organized under its provisions, "to carry on the business of banking by discounting bills, notes and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities, and by exercising such incidental powers as may be necessary to carry on such business," and that a purchase of such paper, made not in the way of discount, was *ultra vires*, as outside the legitimate scope and purposes of such institutions.

Under the congressional enactment the authority which is given is:

"To exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of said title." U. S. R. S., § 5136.

This is substantially like the State statute which was under consideration in *Farmers & Mechanics' Bank* v. *Baldwin*, *supra*. The word "negotiating," as used in this section, and likewise in section 29 of the same statute, is used in its ordinary and appropriate transitive sense to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner and put into circulation. Hence the incidental power to negotiate notes to the extent necessary to carry on the business of banking, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling and transferring it by means of a re-discount obtained, or otherwise. It gives no implied authority to speculate or traffic in paper of the character of the note in question, or in financial securities of

any description. Morse Banks, 4, 5. The powers therefor which are conferred by this section, in respect to the ac quisition of commercial or business paper, are in no way affected c enlarged by the use of the term "negotiating." In the absenc of any authoritative exposition of the Federal statute in thi regard, the principle settled in *Farmers & Mechanics' Bank* v *Baldwin*.must be regarded as decisive of the present case.

It is suggested by counsel for the appellant that upon the ev dence this case is distinguishable from that of *Farmers & Mechanics' Bank* v. *Baldwin*, in that the note sued on here wa indorsed by Butler, the holder, at the time of the transfer to th plaintiff. This fact is undoubtedly a distinguishing though no conclusive test of the character of the transaction, and ordinaril raises a strong presumption denoting the existence of the relatio of lender and borrower between the bank and the party so makin the transfer, and thereby indicates that the parties really intende a loan of money upon the credit of the paper so indorsed; and w have no doubt when such is the intention, "a borrower may," a was held in *Smith* v. *Exchange Bank of Pittsburgh*, 26 Ohio S 141; 1 Nat. Bank Cas. 836, cited by appellant, "obtain the di count by a bank of the existing notes and bills of others, of whic he is the holder, as well as of his own paper made directly to th bank," and that the bank will thereby acquire a valid title to suc paper, because it makes the purchase by discount, or through th exercise of its discounting powers. But where the acts of th parties and the circumstances surrounding the transaction clearl rebut any presumption arising from the indorsement, and in disputably indicate the real nature of the transaction intended b the parties to be, in the language of the court below, "an out and-out purchase of the note, and not discounting it or lendin money on the credit of it," the mere fact of indorsement is no sufficient to warrant the court in treating the transaction as some thing different from what was intended.

We fully concur with the court below in its conclusion as to th character of the transaction in this case. It was an ordinary cas of note-shaving, pure and simple, for the purposes of gain alone outside the circle of any legitimate banking business, and foreig to any purpose for which those institutions are established. N

loan was made or intended, nor was there any discount, in the ordinary and legal acceptation of that term, as applied to the business of banking.

Judgment affirmed

Merchants' National Bank of St. Paul v. Hanson.

(33 Minn. 40; 53 Am. Rep. 5.)

Negotiable instrument — purchase of — notice of equities.

A National bank may recover upon negotiable paper purchased by it.
The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner.*

ACTION on notes. The opinion states the case. The plaintiff had judgment below.

Gordon E. Cole, for appellant.

C. E. & A. G. Otis, for respondent.

Dickinson, J. One Luce was doing business individually, under the name of "The Bank of Breckenridge." He held several notes payable to himself by name, or by the name of "The Bank of Breckenridge." He indorsed these notes, "Pay G. C. Power, or order, for account and credit Bank of Breckenridge. [Signed] E. C. Luce," and sent them to the plaintiff bank with a letter requesting the latter to discount them and place the proceeds to his credit. The plaintiff retained the notes, crediting the bank of Breckenridge with their amount, less interest to the time of maturity, and advised Luce of their action. The sum so credited was afterward paid. Before the maturity of the notes the plaintiff sent the notes to the Bank of Breckenridge for collection, having indorsed them as follows: "Pay Bank of Breckenridge, or order, for collection, account of Merchants' National Bank, St. Paul. F. A. Seymour, cashier." Luce, receiving the notes, transferred

* See to same effect, Gibson v. Hawkins, 69 Ga. 354; 47 Am. Rep. 757.

them by indorsement before their maturity, with the indorseme uncanceled upon them to the defendant in payment of a pre dent debt. The defendant noticed the indorsements when he ceived the notes, but asked no questions and appears to have had notice of the plaintiff's rights respecting the notes, except as i to be inferred from what has been stated. The defendant havi refused to restore the notes to the plaintiff, this action is pro cuted to recover their value.

In *First Nat. Bank of Rochester* v. *Pierson*, 24 Minn. 14 31 Am. Rep. 341; *ante* 506, this court decided that National ba were not authorized to purchase promissory notes in the ordin sense of the word "purchase," the transaction not being a c counting of the paper, or a lending of money upon the credit it; and the defense of *ultra vires* was sustained in an action up a note so purchased. Since that decision was rendered the act Congress upon which it was based has come before the Supre Court of the United States for construction. *National Bank Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12; *National Ba* v. *Whitney*, 103 U. S. 99; *ante* 5. The decisions of that co are to the effect that the enforcement in favor of a bank of secu ties upon real property, which securities the bank had acquir without authority, could not be opposed by the plea of *ul vires*, but that it was intended by Congress that the consequences such violations of law should be only such as might be impos in proceedings instituted against the bank by the governme This construction of the law of Congress is authoritative and is our duty to follow it. In doing so we necessarily overrule *Ba* v. *Pierson*, *supra*, as to the effect of the plea of *ultra vires* such cases.

Applying the principle established by these decisions to t case before us, it is not material whether the transaction throu which the plaintiff acquired the notes was a purchase of the no in the ordinary sense of the word "purchase," or a discount the notes as a loan to the payee. In either case the plaintif right as against this defendant would be the same. That t plaintiff acquired the notes either as its absolute property or security is conclusively shown by the evidence. The defenda claims that the case shows a simple purchase of the notes by t

plaintiff. This may be conceded for the purposes of the case. The special verdict of the jury, to the effect that the plaintiff discounted the notes for the benefit of the Bank of Breckenridge, is not inconsistent with their general verdict in favor of the plaintiff, and may be disregarded without affecting the result. The plaintiff was entitled to recover unless the defendant is to be deemed as having taken the notes unaffected with notice of the plaintiff's rights. The court declared the indorsements sufficient to charge the defendant with notice of whatever interest the Merchants' National Bank had in the notes, and refused to submit the question of the defendant's *bona fides* to the jury. Whether this was error is the only remaining question to be considered.

It is well established that negligence on the part of an indorsee of negotiable paper for value and before maturity, respecting infirmities in the paper or the title to it, will not defeat the title of the purchaser or his right of recovery unless the circumstances are such as to convict him of *mala fides*. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 343; *Freeman's Nat. Bank* v. *Savery*, 127 Mass. 75, 79; 34 Am. Rep. 345; *Magee* v. *Badger*, 34 N. Y. 237; 90 Am. Dec. 691; *Hamilton* v. *Vought*, 34 N. J. L. 187.

We are of the opinion that the case conclusively shows the defendant to have acquired the notes, not merely negligently, but in bad faith. The indorsements to the Bank of Breckenridge "for collection, account of Merchants' National Bank, St. Paul," upon their face indicated that the latter bank had, or at least claimed to have, the title to the notes, and that the Bank of Breckenridge (Luce) was its agent, with authority merely to collect. *Rock Co. Nat. Bank* v. *Hollister*, 21 Minn. 385; *Third Nat. Bank* v. *Clark*, 23 id. 263. This assertion of title, as borne upon the notes themselves, was so placed as to show that it was presumably the last indorsement made. It is true the prior indorsement by the payee to Power being restrictive, did not show that the payee had parted with his title; but it was not necessary that the payee should have indorsed the notes in order to transfer his title. *Pease* v. *Rush*, 2 Minn. 89 (107); *Foster* v. *Berkey*, 8 id. 310 (351); *Cassidy* v. *First Nat. Bank*, 30 id. 86.

If Luce had presented to the defendant notes not thus indors and had stated to him that a St. Paul bank claimed to own t notes and had assumed to constitute him, Luce, its agent to c lect them, a purchase of the property from Luce without furth explanation and without inquiry would, if unaffected by oth circumstances, be palpably inconsistent with good faith. T case before us not less conclusively charges the defendant wi *mala fides*. Luce, assuming to transfer the notes in payment his own pre-existing debt, presented them to the defendant, be ing indorsements uncanceled and unexplained, which upon th face indicated that Luce had no right to dispose of the propert but that it belonged to another. Such was the unmistakable i port of the indorsements. It was not to be presumed that t indorsements had been wrongfully or surreptitiously placed up the notes. It was an extraordinary circumstance that Luce, if was the owner of the paper, should when assuming to dispose of as his own, suffer such indorsements, impugning his own title, remain upon the paper unexplained. The defendant noticed t indorsements, but asked no questions. He testified in his ov behalf, but no explanation or fact is presented going to oppo the conclusion which should be drawn from the circumstanc which we have stated.

The defendant's purpose in acquiring the notes from Luce w of course to make collection from the maker for his own benef Having express notice by the indorsements that Luce probab did not own the property but that this plaintiff was the own he could not willfully disregard the apparent rights of the plaint and by carefully abstaining from such inquiry as the circumstanc suggested, assert the right to defeat plaintiff's title under t claim of being an indorsee in good faith. His conduct in dis garding the notice, and forbearing to make inquiries, is inexplic ble except upon the assumption that he was regardless of t plaintiff's apparent rights, and willfully abstained from inqui lest it should confirm the fact of which the indorsements notifi him, and he should thus be unable to so acquire the notes that might protect himself against the plaintiff's superior right. Th was not merely negligence concerning his own interests or t rights of others, but *mala fides*. The proof of such *mala fid*

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resting in the circumstances detailed, is unopposed by any fact going to support a contrary conclusion, and the court did not err in determining the matter as a conclusion of the law. *Jones* v. *Gordon*, 2 App. Cas. 616; *National Security Bank* v. *McDonald*, 127 Mass. 82; *National Bank of Com.* v. *Law*, id. 72; *Fowler* v. *Brantly*, 14 Pet. 318.

Order affirmed.

Thornton v. National Exchange Bank.

(71 Mo. 221.)

Mortgage — taking as security — effect. Contract — assumption of another's obligation — failure of consideration. Deed — husband and wife — acknowledgment. Principal and surety — securities taken by surety — tender of debt discharges lien.

If a National bank discounts a note secured by deed of trust on real estate, the security passes to and may be enforced by the bank, subject only to forfeiture of its charter, which penalty can be invoked only by the United States.

On foreclosure of a deed of trust upon a leasehold interest executed by an association to secure its debts, B. & T. became the purchasers. As payment of the purchase-money they assumed the debt, and by way of indemnity to certain sureties of the association, they executed a mortgage in their favor. At this time the leased property was subject to a deed of trust which was subsequently foreclosed, whereby the leasehold interest was extinguished. B. & T. bought with knowledge of this deed of trust and without warranty of title to the leasehold, and no fraud or deceit was practiced on them. *Held*, that as between them and the sureties whom they had indemnified, the liability of the latter had not been revived, and they had a right to claim the benefit of the mortgage B. & T. had given them.

Where husband and wife are named at the commencement of a deed as parties of the first part, and afterward the parties of the first part are named as grantors, the instrument is the deed of both husband and wife.

Where a certificate of acknowledgment of a deed executed by husband and wife to convey lands of the wife, states that the wife, upon separate examination, acknowledged that she executed the deed and relinquished her dower in the lands, the deed will pass her fee-simple interest.

Securities taken by sureties for their indemnity, inure to the benefit of the creditor.

Where two deeds of trust were given to secure several notes, all held by different persons, and it was provided in each deed that if the grantor should pay one-half of the debt and interest expressed in the notes, the

deed should become void, and the grantor in one of the deeds tende the holder one-half of his note and interest, and the holder refus tender; *held*, that as to that note the lien of the deed of trust w charged.

ERROR to Callaway Circuit Court, Hon. G. H. Burckh Judge.

Mary O. Thornton and Amos B. Thornton sued Bragg b tachment and garnished the National Exchange Bank as the h of a note for $4,744.50 made by Lamkin. Lamkin had bou property known as "Bragg's Hall," at trustee's sale, and in ment of his bid had made this note to the trustee, Miller, wh assigned it to the National Exchange Bank, who claimed to as to the $1,000 of the amount, for the benefit of the Firs tional Bank, and as to the remainder, for itself, and interpl this claim. "Bragg's Hall" had been the joint property of and Mary O. Thornton, and plaintiff's attachment was o theory that the deed of trust to Miller was given to secure tional bank for a present advance of money, and was void the National Banking Act, and hence one-half of the proce the sale by Miller belonged to Bragg, and was liable to attach for his debt. As to the other half for the same reason claimed it as the property of Mary O. Thornton. Plaintif tained judgment against Bragg, but upon a trial of the inte there was a judgment for the interpleader, to reverse v plaintiffs took this writ of error. Other facts appear i opinion.

Nathan C. Kouns, for plaintiffs in error.

Ewing & Pope, for respondents.

Per Curiam. This was a suit by attachment instituted i Cole Circuit Court against Charles G. Guenther, administrat the estate of Henry Bragg, deceased, in which the National change Bank and the other parties to the cause were summ as garnishees. A change of venue was taken to the Call Circuit Court.

On the 21st day of March, 1874, said Bragg executed an livered to H. Clay Ewing two promissory notes, one for $2

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and the other for $700, payable three months thereafter to H. Clay Ewing at the First National Bank, Jefferson City. On the same day, said Bragg and wife conveyed to P. T. Miller in trust to secure said notes, property in Jefferson City known as "Bragg's Hall," and on the same day Ewing indorsed said notes to the National Exchange Bank, a corporation organized under the act of Congress in relation to National banks. On the 5th day of May, 1874, said Bragg and wife conveyed to Mary O. Thornton, by deed of that date, one undivided half of said property for the consideration of $7,000, expressly subject to said deed of trust. On the 25th of February, 1875, said Mary O. Thornton and her husband, A. B. Thornton, and Henry Bragg and wife conveyed said property to H. Clay Ewing in trust to indemnify the sureties of said Henry Bragg and Amos B. Thornton in their notes, one to the National Exchange Bank for $592; one to Sarah A. Chiles for $556.75, and one to the First National Bank of Jefferson for $1,000. The note to Mrs. Chiles was afterward paid. J. R. Crow and A. W. Ewing were sureties on the notes to Mrs. Chiles and the National Exchange Bank, and together with Green C. Berry, were sureties on the note to the First National Bank. These notes bore date 3d day of February, 1875. The suit of Thornton and wife by attachment against Bragg's administrator was substantially for a breach of covenant in the deed from Bragg to Mrs. Thornton, and by garnishment they seek to subject the proceeds of the sale of the "Bragg Hall" property by P. T. Miller, trustee in the first described deed of trust, to the payment of the judgment recovered by them against Bragg's administrator. That judgment has not been appealed from, and we have only to consider the proceedings in the garnishment cases from the judgment in which Thornton and wife have appealed to this court. At the sale of said property by P. T. Miller, as trustee, May 22, 1875, one Lamkin became the purchaser at the price of $4,744.50, for which he executed his note to said trustee, who on the same day assigned it to the National Exchange Bank for the benefit of that bank and the holders of the notes described in the deed of trust of February 25, 1875. The garnishments were served after the sale of the property, and after the assignment of the Lamkin note to the bank.

By the assignment of the notes of Bragg to the National
change Bank by H. Clay Ewing the deed of trust passed to
bank, and as the execution of the notes and the deed of trust
the advancement of the money thereon by the bank were c
temporaneous acts, the transaction was a violation of section
of the act of Congress, which provides as follows:

"It shall be lawful for any such association to purchase, hold and con
real estate as follows: *First.* Such as shall be necessary for its immediate
commodation in the transaction of its business. *Second.* Such as shall
mortgaged to it in good faith by way of security for debts previously
tracted. *Third.* Such as shall be conveyed to it in satisfaction of debts
viously contracted in the course of its dealings. *Fourth.* Such as it shall
chase on sales under judgments, decrees or mortgages held by such asso
tion, or shall purchase to secure debts due to said association. Such asso
tion shall not purchase or hold real estate in any other case or for any ot
purpose than those specified in this section, nor shall it hold the possessio
any real estate under mortgage, or hold the title and possession of any
estate purchased to secure any debt due to it for a longer period than
years."

The transaction betwixt Ewing, Bragg and the bank was
consummation of a loan by the bank to Bragg, and Ewing
not an accommodation indorser. Conceding, as it is claimed, t
it was a violation of the foregoing section of National Bank La
would the court, in a proceeding by these plaintiffs for that p
pose, have annulled the mortgage? We are aware that in
case of *Matthews* v. *Skinker*, 62 Mo. 329; 21 Am. Rep. 4
this court enjoined the sale of trust property, and held the de
of trust void in a similar transaction to that between Ewi
Bragg and the bank. The judgment however in that case w
on appeal to the Supreme Court of the United States revers
the court holding that the deed of trust was not void, and that
was error to enjoin the trustee from selling thereunder, and t
while the law authorizing the establishment of National ban
prohibits them when established from lending money on real
tate security, yet if loans are made on such securities they
not void, but may be enforced. It was also held that a pers
borrowing money on such security could not interpose the sta
tory prohibition as a defense in a proceeding to enforce it,
court using the following language: "We cannot believe it w
meant that stockholders, and perhaps depositors and other cr

itors, should be punished and the borrower rewarded by giving success to this defense whenever the offensive act shall occur. The impending danger of a judgment of ouster and dissolution was we think the check, and none other contemplated by Congress. That has always been the punishment prescribed for a wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot directly or indirectly usurp this function of the government." 98 U. S. 621; 2 Nat. Bank Cas. 12; *sub nom.*, *National Bank* v. *Matthews*.

The same doctrine is enunciated in the following cases: *Leazure* v. *Hillegas*, 7 Serg. & Rawle, 320; *Goundie* v. *North Water Co.*, 7 Penn. St. 233; *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370; *McIndoe* v. *City of St. Louis*, 10 Mo. 577; *Chambers* v. *City of St. Louis*, 29 id. 543; *Land* v. *Coffman*, 50 id. 243; *Runyan* v. *Coster*, 14 Pet. 122; *Wroten's Assignee* v. *Armat*, 7 Rep. 797. We have been cited to cases decided by several State courts, giving a different construction to the act of Congress in question from that put upon it by the Supreme Court of the United States in the case of *Matthews* v. *Skinker*. We cannot however follow them, being bound by the decision of the latter court, the peculiar province of which is to determine all questions involving a construction of the laws of Congress. Adopting that construction, we are of the opinion that plaintiffs, as creditors of Bragg, can assert no claim in the garnishment proceedings to the proceeds of the sale of the mortgaged property so far as they have been applied to the payment of the notes held by the National Exchange Bank and indorsed by H. C. Ewing.

A large surplus of the proceeds of the sale of the Bragg Hall property remains after the payment of said demand, which is claimed by plaintiffs and also by the beneficiaries in the deed of trust executed by plaintiffs and by Bragg and wife, and the only question left is as to its disposition.

The deeds of trust executed by Bragg and wife and Thornton and wife were made to indemnify the sureties on the notes mentioned, Ewing, Crow and Berry. It was alleged and proved that said debts were contracted before the date of the notes, for furnishing and finishing the third story of "Bragg's Hall," and that

the sureties were bound for said debts, before Thornton and B assumed them; that said sureties were agents or trustees o association which had taken a fifteen-year lease from Bragg the third story of the hall; that they executed a deed of trust veying said interest to one Lamkin to secure said indebtedn that Lamkin advertised the same for sale under the deed of t and by arrangement of all the parties, Bragg and Thornton chased said interest and assumed the debts for which the trust was executed, and that this was the only consideration for t assumption of said indebtedness. Because the lease was tinguished by the sale under the deed of trust to P. T. Mille is contended the sureties again became bound as principals for said debts.

Upon what principle such a result is predicated we are un to perceive. No deceit or fraud was alleged against the sure Bragg and Thornton were aware of the existence of the deed trust when they purchased the lease. Mrs. Thornton also k of its existence, for it was expressly mentioned in the deed f Bragg and wife, conveying to her one undivided half of the pr ises. There was no warranty of the title acquired by Bragg Thornton to the leasehold interest, and no obligation expres implied that if the lease should be extinguished by a sale u the deed of trust the sureties would be responsible for the d assumed by Bragg and Thornton. The consideration they recei for assuming the debt, was the fifteen-year lease, which they t subject to the deed of trust, and therefore took the risk of an tinguishment of the lease by a sale under the deed of trust.

Nor were these sureties affected or bound by the equities tween Bragg and Mrs. Thornton in regard to the agreement Bragg with her to apply the proceeds of certain notes assigned him by her to the debt secured by said deed of trust. These n were assigned to him as part payment of the money she was pay for one-half of the "Bragg Hall" property, and he agr with her to apply the proceeds in payment of said $3,000 indebt ness to the National Exchange Bank.

It is also urged by Thornton and wife that the deed of tr executed by them to indemnify the sureties did not con her interest in "Bragg Hall," because in the acknowledgm

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it was stated that she relinquished her dower, and her name does not appear in the body of the deed, as a grantor therein. And *Shroyer* v. *Nickell*, 55 Mo. 264, and *Whiteley* v. *Stewart*, 63 id. 360, are cited as sustaining that view. In the body of the deed she is named as one of the parties of the first part, and the parties of the first part are named as the grantors. *Shroyer* v. *Nickell* was a case in which an equitable defense to an action of ejectment was pleaded, and the facts relied upon were that Shroyer and wife had, by mistake, made a conveyance of another tract, intending to convey the land in dispute, and defendant asked a reformation of the deed against the wife. The court decided that as the property was not separate property of Mrs. Shroyer this could not be done, and the case has no bearing upon the question. In *Whiteley* v. *Stewart*, the commencement of the deed named Whiteley and wife as parties of the first part, but in the body of the deed, the husband alone was named as grantor and the name of the wife did not again appear except in their signatures to the deed. The court expressly held that the deed showed upon its face that she never granted the land, but her husband was sole grantor.

In *McDaniel* v. *Priest*, 12 Mo. 545, it was decided that "where a certificate of acknowledgment upon a deed executed by husband and wife to convey lands of the wife, stated that the wife upon separate examination acknowledged that she executed the deed and relinquished her dower in the lands mentioned in the deed," the deed would not pass a fee-simple interest of the wife. But in *Chauvin* v. *Wagner*, 18 Mo. 546, this case was overruled, and *Chauvin* v. *Wagner* has been followed in *Delassus* v. *Poston*, 19 Mo. 425; *Thomas* v. *Meier*, 18 id. 573; *Perkins* v. *Carter*, 20 id. 465, and *Thomas* v. *Hesse*, 34 id. 13; 84 Am. Dec. 66.

Plaintiffs in error rely upon the doctrine that "a security will be subrogated to the rights of the creditor upon paying his principal's debt, and not until then." And their counsel quotes with emphasis the language of the court in *Hearne* v. *Keath*, 63 Mo. 84, to the effect that the principal does not become a debtor to the surety, until the latter has paid the debt, "and until then his demand has no existence." There can be no doubt of that proposition, but it is equally well settled that securities taken by the

sureties for their indemnity inure to the benefit of the credi
who may resort to them for the satisfaction of his debt. Here
creditors ask to be subrogated to the rights of the sureties, a v
different case from that considered in *Hearne* v. *Keath*.

The deeds of trust executed by Bragg and wife and Thorn
and wife of even date were made, one by Bragg and wife c
veying the "Bragg Hall" property, and the other by Thorn
and wife conveying the same property, Bragg and Mrs. Thorn
being each the owner of an undivided half, and it was a stipu
tion in each of said deeds, that if the parties of the first part p
one-half of the debt and interest expressed in said notes and ev
part thereof, when the same became due, the deed should beco
void, etc. Each of the notes was held by and made payable
different persons. The National Exchange Bank held one. Th
was no connection of one with the others, or with either of
others, except in the deeds of trust. The holder of neither n
had any interest in the payment of the others. A. B. Thornt
one of the debtors, at their maturity, tendered to the Natio
Exchange Bank one-half of the notes that bank held against h
and Bragg, and the bank refused to accept it, insisting upon p
ment of the whole amount. Mrs. Thornton conveyed her pr
erty to secure that half. She is therefore as to that to be trea
in some respects as a surety, though not personally bound
any part of the debt, and the refusal of the bank to accept
money so tendered, extinguished the bank's lien on her prope
to that amount. *Olmstead* v. *Tarsney*, 69 Mo. 396; *Frost*
Yonkers Savings Bank, 70 N. Y. 553; 26 Am. Rep. 627.
fair construction of the deeds authorizes either of the debtors
pay one-half of either of the notes secured by the deed of tru
without being compelled to pay the other half, although bo
were jointly bound for the whole amount. While as betwe
Thornton and the bank, the latter had the right to refuse to
cept a portion of its debt, as betwixt Mrs. Thornton and the ba
it had no such right.

After the payment of the note and interest secured by the de
of trust to Miller and the costs and expenses of executing th
trust, and payment of the note held by the First National Ba
with interest, and one-half of the note held by the National B

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change Bank and interest, Mrs. Thornton is entitled to any balance that may remain, not exceeding the amount of the judgment in favor of Thornton and wife against Bragg's administrator.

The judgment is reversed, and the case remanded, to be proceeded with in conformity with this opinion; HENRY, J., not sitting.

WHERRY v. HALE.

(77 Mo. 20.)

Trust — dealings with real estate.

To avoid the supposed effect of certain provisions of the National Banking Act, a National bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee, for a receiver of the bank, was valid.

National banks may hold and convey real estate which they purchase at sales under judgments, decrees or mortgages held by them to secure debts due them.

If a National bank violates the National Banking Act in dealing with real estate, the government alone can take advantage of it.

APPEAL from Johnson Circuit Court; Hon. NOAH M. GIVAN, Judge.

S. T. White, for appellant.

O. L. Houts, for respondents.

HENRY J. This is a suit to set aside certain conveyances of real estate made by A. W. Ridings to Hale in trust for the receiver of the First National Bank of Warrensburg, on the ground that they were without consideration, and made with the intent to hinder, delay and defraud creditors.

Plaintiff, prior to the institution of this suit, had sued Ridings in attachment, under which the lands in controversy were levied upon. He obtained a judgment in that suit. The deeds from

Ridings were executed and recorded, except one, before the lev
the attachment, and that deed was not recorded until after.
defendant denied the fraud, and alleged that Ridings was lar
indebted to the bank, at and prior to the date of the conveya
made by him; that of said lands the bank was the real owne
a portion, and Ridings held them in trust for the bank, and
veyed them to the bank in execution of the trust, and the bal
to secure his indebtedness to the bank. The evidence was
the lands were all held by Ridings under deeds which expre
no trust; that he stated repeatedly that he owned the lands
the Marlatt property, which the defendant alleges he hel
trustee for the bank. This land was what is known as the Sl
and Emery lands. The cashier of the bank testified that Rid
for the bank purchased the above-named property under a
of trust given to secure notes which had been assigned to
bank. This was his understanding. Ridings paid nothing fo
The conveyance was so taken for convenience, and because a
neys advised that it was better on account of provisions of
National Banking Law, which they thought would give the b
trouble. It was the understanding of Gen. Cockrell and J
Cockrell that Ridings held the land for the bank, and in O
ber, 1878, Ridings executed a writing under seal, never recor
however, declaring that he held the land for the bank. Lee
Jack, assistant cashier of the bank, testified that the Marlatt p
erty and the Emery farm were held by Ridings for the ba
that the attorney's receipts for the notes which were secured
the lands, were carried in the bank books as past-due papers.
the other hand the bank never made any statement showing
directly or indirectly it held any land. Its public statements
assets and liabilities, made by the bank, contained no mentio
land. On the evidence the Circuit Court found for defend
and rendered a judgment, from which this appeal is taken.

We have failed to discover any evidence to prove that Ridi
purpose in making the conveyances was to defraud his credit
There is not a scintilla to show any participation by the ban
any fraud, even if Ridings intended it. He was indebted to
bank in the sum of $82,638.59. He was reputed to be wealt
and Gen. Cockrell testifies that he would, if called upon, h
sworn that he was worth $50,000 over and above all liabilitie

Plaintiff testifies that he lent him the money for which he sued, "on the faith that he owned this and other property." He does not say or intimate that he would not have done so, if he had known that he did not own this property, which constituted but a small portion of his reputed wealth.

The Circuit Court no doubt found that there was no fraud in the transaction between Ridings and Hale or the bank, but that Ridings held the Sharp and Emery land and the Marlatt property in trust for the bank. The repeated declarations of Ridings that he owned the lands were consistent with the reasons assigned by the bank for having him hold the lands in his own name. It would have defeated the object they had in that arrangement if it had been proclaimed that he held the lands otherwise than as the deeds expressed. This was not an arrangement made to impose upon any one, but one of convenience. Ridings paid nothing for the land, and in fact, as the testimony shows, held it for the bank, and all the evidence which seems to conflict with that view of the case are Ridings' declarations that it was his, prompted no doubt by a desire to withhold from the public the fact that the bank owned any lands. Holding for the bank, the conveyance of the lands to its trustee for the receiver was but the execution of a trust reposed in him, which a court of equity would have compelled had he refused. *Payne* v. *Twyman*, 68 Mo. 339.

There was nothing in the transaction violative of the National Banking Act, nor is there any provision of that law which would have prevented the bank from taking a deed to the property in its own name. That act authorizes such banks to hold and convey such real estate as they shall purchase at sales under judgments, decrees and mortgages held by such associations, or to secure debts due to such associations. The Sharp-Emery land and the Marlatt property were sold under deeds of trust given to secure notes assigned to the bank by holders thereof.

But if it had been otherwise, in the case of *Union National Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12, it was decided by the Supreme Court of the United States that a breach of that section of the act cannot be taken advantage of by the person dealing with the bank, but only by the government.

Certainly the plaintiff in this case, who was no party to transaction, cannot impeach the transaction in question as vi tive of the National Banking Law.

No actual fraud having been proved to affect the conveyan the right of Ridings to prefer one *bona fide* creditor to anot cannot be questioned, and on that ground the conveyances of property other than the Sharp and Emery land are beyond q tion. They were made and recorded before plaintiff's attachm was levied, and that question which had been raised as to the veyance of the Sharp-Emery lands does not arise with respec the other property. The attachment was levied after the ex tion of all the deeds in question, but before the deed convey the Sharp-Emery land was recorded.

The attachment only held Ridings' interest in the land. conveyances made by him were not of his interest in the la They simply conveyed to the bank what in equity belonged the bank before they were executed, and all fraud out of case, there can be no question that the title of the bank was g as against creditors of Ridings.

The judgment is affirmed.

CITY OF SPRINGFIELD v. FIRST NATIONAL BANK OF SPRI FIELD.

(87 Mo. 441.)

Taxation — stock — refusal of officers to furnish list.

Assessment of taxes against National bank stock must be made against shareholders personally, and the refusal of the officers of the bank to f nish the assessor with a list of shareholders does not justify making the sessment and enforcing the tax against the property of the bank.

APPEAL from Greene Circuit Court, Hon. W. F. GEIG Judge.

J. P. McCammon, for appellant.

J. R. Vaughan, for respondent.

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NORTON, J. This case is before us on plaintiff's appeal from the action of the Circuit Court in sustaining a demurrer to the following petition: The petition, after stating that defendant was a banking corporation organized under the laws of the United States, and doing business in Springfield, proceeds to state that plaintiff by her charter, granted by a public act of the Legislature, had power by and through her city council to levy and collect taxes upon real and personal property within her corporate limits not to exceed one per cent of the assessed value thereon, and to apply such penalties for the non-payment thereof as said council may see fit. That by virtue of said power the city council of said city of Springfield did, by an ordinance approved March 29, 1880, entitled an ordinance for the levying of a tax for current expenses, and a special tax for an "interest and sinking fund and past indebtedness fund," levy a tax for said year 1880 of $1 on the $100 valuation on all property, real and personal, within the corporate limits of said city which was subject to taxation, which said levy was distributed as follows, viz.: One-half of one per cent for the current expenses of the city for the fiscal year, commencing March 1, 1880, and one-half of one per cent for the interest and sinking and past indebtedness funds. That as a basis for the said levy, and in conformity with an ordinance entitled "An ordinance in revision of ordinances for the government of the city of Springfield," approved March 22, 1878, the duly elected and qualified assessor of said city, acting under the authority of said city council as expressed in said last-mentioned ordinance, did, between the first Monday in August, 1879, and the first Monday in February, 1880, make an assessment of all the property, real and personal, within the corporate limits of said city which was subject to taxation."

That at said dates hereinbefore mentioned the capital stock of said defendant was $50,000, and the sum was divided into shares of $100 each par value. That between said dates, to-wit: the first Monday in August, 1879, and the first Monday in February, 1880, the said city assessor did call upon and demand of the cashier and the president of said defendant a list of stockholders of said defendant and the amount or number of shares held by each; but said cashier and said president, each in viola-

tion of the statute in such case made and provided, failed and
fused to deliver said list of shareholders as aforesaid, where
the said assessor was unable to assess the individual sharehol
as required by law; but plaintiff avers, that acting upon his
information and under the law in such case made and provi
said city assessor assessed said defendant $100,000 on the ag
gate shares of stock of said defendant. That defendant a
time before the commencement of this suit, and not until a l
time after said commencement, objected to the irregularit
said assessment against said bank for the aggregate shares;
on the contrary, by its cashier tendered to plaintiff the sun
$333 in payment of said taxes; the said defendant objecting
to the assessment of said stock at its full valuation instead
two-thirds valuation thereof. That afterward the board of eq
ization of Greene county, State aforesaid, fixed the assessmen
said stock of defendant at the sum of $50,000 on the tax bo
of said county, and therefore the valuation made by the
assessor was reduced by the city council to the said sum
$50,000. That the said council, by an ordinance entitled "An
dinance in revision of the ordinances for the government of
city of Springfield," approved March 22, 1878, applied a pen
of ten per cent on all taxes not paid to the collector by the
Monday in September of the year for which they were levi
That the taxes on said stock of defendant amounted to the s
of $500, and the penalty for their non-payment in due time to
sum of $50, making in all the sum of $550. That defendan
indebted to the plaintiff in the said sum as will more definit
appear from the account herewith filed; which sum is yet
and unpaid, for which plaintiff asks judgment, and for costs.

In the cases of *Lionberger* v. *Rowse*, 43 Mo. 67, and *Fi
Nat. Bank* v. *Meredith*, 44 id. 500, it was held, that under
statute of this State, persons owning shares of stock in banks
other incorporated companies taxable by law, are not required
deliver to the assessor a list thereof, but that the president
other chief officer of such corporation shall deliver to the asses
a list of all shares of stock therein, and the names of the pers
who hold the same; that the taxes assessed on the shares of st
embraced in such list shall be paid by the corporations resp

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tively, and they may recover from the owners of such shares the amounts so paid by them, or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made; that such assessment is distinctly and separately required to be made against the shareholders. In the case last cited it is said: "While the assessor may obtain of the bank a list of the shareholders as provided by statute, he should make the assessment against them personally, and hence the collector has no right to collect the tax by selling the property of the bank, or the share or property of any shareholder except that of the defendant." The petition admits that the tax sought to be enforced against the bank ought, under the law, to have been assessed against the shareholders personally, and avers that it was not so done because the officers of the bank violated the law in refusing to furnish the assessor with a list of the shareholders.

The violation of the law by the officers of the bank, which, under section 6694 of the Revised Statutes, subjected them to the payment of the sum of $1,000 to the State, to be recovered by indictment, neither conferred a right upon the assessor which the law denied to him, nor justified him in making the assessment in any other mode than is by the statute prescribed. Notwithstanding the refusal of the officers of the bank to furnish the assessor with a list of the shareholders, other effectual means of information were open to him under section 5210 of the Revised Statutes of the United States, which requires the president and cashier of every National association, at all times, to keep a correct list of the names and residences of the shareholders, and the number held by each, and further provides that the same shall be open to the inspection of the officers authorized to assess taxes under State authority. The petition does not aver that the assessor either demanded such inspection, or that it was denied to him, or that such list was not in fact kept as required by the law of Congress. Besides this, our statute contemplates that when the tax assessed upon shares of stock is not paid, that the tax is to be enforced, not by suit against the bank, but by the sale of the stock of the shareholders. To this end it is provided by section 6756, that it shall be the duty of the cashier, secretary or chief

clerk of any corporation, the shares of which are taxable by at the request of the collector to give him a certificate sho the number and amount of shares held in the stock of such poration, the names of the holders and the incumbrances the and such collector, in default of the payment by the corpor of the taxes due thereon, shall sell the same for the payme such taxes.

In view of this and other sections of our statute, it wa pressly held in the case of *First Nat. Bank* v. *Meredith*, s that the assessor should make his assessment for taxes on shares against the shareholders personally, and the collector h right to collect the tax by selling the property of the bank, o shares or other property of the shareholders, except that of th linquent. To adjudge the petition in this case to be sufficient w be to allow the property of the bank to be subjected to the ment of the taxes of the delinquent shareholders, which th thority referred to declares cannot be done.

Judgment affirmed, in which all concur.

Schierenberg v. Stephens.

(32 Mo. App. 314.)

Stock — increase of — subscriber's rights and liabilities.

A National bank determined to increase its capital stock from $300,0 $500,000. The new stock subscriptions amounted to only $130,060. bank advertised an increase to $430,060. This was never authorize vote of the stockholders, nor certified to or approved by the Comptroll the Currency. The plaintiff subscribed and paid $2,000 for so much o originally proposed increase. *Held*, that plaintiff did not become a s holder, and when the bank became insolvent was entitled to judg against the receiver for the amount so paid.

APPEAL from St. Louis City Court.

Draffer & Williams and *D. W. Shackleford*, for appellan

Klein & Fisse and *John K. Tiffany*, for respondent.

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ROMBAUER, P. J. The only error assigned on this appeal is that the trial court erred in sustaining a demurrer to certain parts of the defendant's answer; it is therefore essential in reviewing the propriety of the action of the court, to set out in full such parts of the pleadings as bear upon that question.

The action was instituted against the Fifth National Bank corporation and its receiver. During the pendency of the proceedings, and before judgment on the demurrer, the corporation was dissolved, the action against it abated, and judgment was rendered against the receiver, who alone appeals.

The petition against the bank and its receiver states: That the said bank was at the time of the filing of said petition, and at the several times therein mentioned, a body corporate, duly organized under the laws of the United States relating to National banks, with a duly authorized capital stock of $300,000, and that said bank did business up to the 8th day of November, 1887, as a National bank.

That on the 8th day of November, 1887, said bank, which was then and for a long time prior thereto had been absolutely insolvent, suspended business, and the Comptroller of the Currency of the United States, after due examination of the affairs of said bank, did become satisfied of its insolvency, and did thereafter, on or about the 15th day of November, 1887, appoint the defendant Lon V. Stephens, as receiver of said bank, under the provisions of the laws of the United States, and that said Stephens duly qualified as such receiver, and was at the time of the filing of said petition in charge and possession of the books, records and assets of every description of said bank, and collecting all debts, dues and claims belonging to it, under the direction of the Comptroller of the Currency of the United States, and proceeding to close up said bank.

That between the 1st day of February and the 8th day of November, 1887, plaintiff deposited in said bank in monthly installments of $200 each month, on or about the first of each month during said period, the total sum of $2,000, the last of said deposits being made by him on or about the 1st day of November, 1887; that the said sums were deposited by him in said bank and received by it to be held in trust for and to the use of

plaintiff, and to be applied by said bank in payment for tw
shares of the par value of $100 each of a proposed increa
the capital stock of said bank in the sum of $200,000, so
the entire capital stock of said bank should be $500,000;
that said twenty shares of such proposed increase of the ca
stock of said bank were to be issued and delivered to plainti
said bank when this plaintiff should have deposited in said
the full sum of $2,000, the par value thereof, and when the w
amount of such proposed increase of $200,000 of said ca
stock should have been paid into said bank, and when the
ficate of the Comptroller of the Currency of the United St
specifying the amount of such increase of capital stock, with
approval thereof, and that it had been duly paid in as part o
capital stock of said bank, should have been obtained.

That at the time of making the several deposits aforesa
said bank for the purpose and upon the conditions afore
plaintiff had no knowledge of the insolvency of said bank
of the illegality in the proceedings attempting to authorize
said proposed increase of its capital stock in the sum of $200,
but since the suspension of said bank has learned thereof.
the plaintiff alleges that said proposed increase of the ca
stock of said bank was never lawfully authorized by the owne
two-thirds of the capital stock of said bank, nor did two-th
of the owners of said original capital stock ever vote for such
crease, as required by law; nor was the whole amount of $200
of such proposed increase of stock ever paid into said bank
required by law; nor was the amount of such proposed incr
of stock which was agreed to be taken and paid for ever
into said bank; nor was the certificate of the Comptroller of
Currency of the United States, specifying the amount of said
posed increase of capital stock, with his approval thereof, and
it had been paid in as part of the capital of said bank, ever obtai
but by reason of the insolvency and suspension of said bank and
consequent winding up of its affairs, none of said conditions an
quirements have been or can now or ever be fulfilled or comp
with on the part of said bank, nor can the contract between
bank and this plaintiff in reference to said twenty shares of s
ever be completed or performed.

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The plaintiff further alleges that said bank treated the amount so received by it from him as a trust fund for his benefit, and that by reason of the circumstances aforesaid plaintiff is entitled to the said sum of money, and the said bank is indebted to him therefor and also for lawful interest thereon.

The plaintiff also alleges that he had presented his claim for said sum of money so due him to the said defendant Lon V. Stephens, as receiver, and demanded the allowance thereof against the estate of said bank, but that said receiver had refused and still refused to allow the same. Wherefore plaintiff prays judgment against the Fifth National Bank of St. Louis and its assets in the hands of said receiver for the said sum of $2,000, with interest from the days of said several deposits, and for his costs in this behalf, and for such other and further relief as plaintiff may be entitled to under the circumstances of the case.

The defendants filed their joint and several answer to the plaintiff's petition, whereby it is admitted that the Fifth National Bank was at the several times named in the petition a body corporate, duly organized and existing under the laws of the United States relating to National banks, and that said bank did business until November 8, 1887, as a National bank. By said answer it is also admitted that said bank suspended business on the 8th day of November, 1887, and that the Comptroller of the Currency of the United States on the 15th day of November, 1887, appointed the defendant Lon V. Stephens, receiver of said bank, under the provisions of the laws of the United States, and that said Stephens duly qualified as such receiver, and is acting as such. All the other allegations of the petition were specifically denied in the answer.

And the following additional defense was pleaded therein, namely: "The defendants for further answer and defense to plaintiff's petition say, that the defendant the Fifth National Bank of St. Louis, Mo., was on the 27th day of November, 1886, and for a long time prior thereto had been duly organized under and in accordance with the provisions of the laws of the United States for the organization of National banks, and that its capital stock at that time was $300,000; that on said 27th day of November, 1886, the board of directors of said bank called a

meeting of the stockholders thereof, to be held at the of
said bank on the 11th day of December, 1886, to vote u
proposition to increase the capital stock of said association
sum of $200,000; that a meeting of said stockholders wa
at said time and place and the following resolution was ad
by a vote of more than two-thirds of the stockholders of s
sociation, to-wit:

"*Resolved*, That under the provisions of the act of M
1886, the capital stock of this association be increased in th
of $200,000."

That the defendant subscribed unconditionally for twenty
of said stock and agreed and bound himself to pay therefo
par value thereof, to-wit, the sum of $2,000, and afterward di
untarily pay to said bank the said sum upon his said subscr
for said twenty shares of stock as aforesaid; that there wa
scribed and paid, including the plaintiff's subscription afores
the 5th day of October, 1887, the sum of $430,060 as the c
stock of said bank; that the officers of said bank reported
Comptroller of the Currency of the United States that the
tal stock of said bank had been increased, and that the
amount of its capital stock at said date was $430,060, incl
the plaintiff's subscription, as aforesaid, was treated by pla
and other stockholders of said company, and the officers th
and the Comptroller of the Currency of the United States
part of the capital stock of said bank, and the subscribers th
as stockholders in said bank, to the amount of their sever
spective subscriptions; that said bank, in order to increa
business and obtain credit, with the knowledge and consent o
plaintiff, held out to the public and advertised that its c
stock had been increased, and included in the statement
capital stock the amount subscribed and paid in for the new
aforesaid, thereby advertising its stock as $430,060, and wit
knowledge and consent of the plaintiff represented the am
sued for by him as a part of its capital stock and subject to a
ment as such, and thereby constituting assets of said bank in
of a liability upon its part, as alleged by plaintiff in his peti
that said increase of stock was recognized and treated by
stockholders and officers of said bank, and held out to the p

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as valid and binding and constituting part of the capital stock of said bank, and that said bank obtained credit and contracted debts now unpaid upon the faith thereof; that the money sued for by plaintiff was paid voluntarily by him, and was treated by him as a payment for stock, as aforesaid, and not otherwise. Wherefore defendants say plaintiff is not entitled to the judgment prayed, or any judgment herein, and they ask to be hence dismissed with costs."

In due time the plaintiff demurred to this affirmative defense set up in the answer, on the following grounds: 1. Because said part of said answer does not state facts sufficient to constitute a defense to the plaintiff's action herein. 2. Because the allegations contained in said part of said answer are wholly insufficient to constitute a defense to plaintiff's action, and because the matters and facts therein alleged are insufficient to create any liability on the part of this plaintiff as a stockholder in said Fifth National Bank. 3. Because it is nowhere alleged in said part of said answer, that the whole amount of the proposed increase in capital stock mentioned in said answer has ever been paid in. 4. Because it is nowhere alleged in said part of said answer, that any notice of said increase of capital stock of said bank has ever been transmitted to the Comptroller of the Currency of the United States, or his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been paid in as part of the capital of said association. 5. Because the matters and facts pleaded in said part of said answer by way of estoppel are utterly irrelevant, immaterial and insufficient to constitute any defense to this action.

This demurrer was sustained by the court, and upon a trial of the remaining issues the court rendered a judgment in favor of plaintiff for the amount claimed.

The receiver's first contention is that the plaintiff, by subscribing for twenty shares of the proposed increase of stock unconditionally, and by voluntarily paying therefor without waiting until the entire amount was taken, waived whatever condition was attached to the subscription and became absolutely bound.

To create a valid increase of the capital stock of a National bank under the law as it stood when the increase of stock of this

bank is alleged to have been made, a preliminary vote of shareholders owning two-thirds of the stock, the payment bank of the whole amount of increase, and the certificate of Comptroller of the Currency, specifying the amount of the crease and his approval thereof, and certifying to the facts of ment, were essential. The law provides that no increase of capital stock of any National banking association shall be m except in the manner therein provided. It is not questioned these conditions entered into and formed part of the plaint contract of subscription. The pleader's averment that the pl tiff subscribed unconditionally and afterward paid voluntar admit legally only of the construction that his subscription subject to no other conditions than those imposed by the stat and that his payment was voluntary in the sense in which performance of conditions precedent is voluntary on the par every one who by such performance seeks the ultimate benefi a contract.

The receiver contends that since an express condition of scription may be waived by recognizing the subscription as va this is *a fortiori;* the rule where the condition is merely impl An examination of the cases will show that as between the tracting parties, this is the case only where both parties have legal power to waive the condition, as was the case in *Delan Butler*, *infra*, or where a contract has been executed in whol in part, and one of the parties assumes to retain the considera received, and yet seeks to repudiate the obligation imposed u him on the ground of the legal invalidity of the contract, as partly the case in *Delano* v. *Butler*, and wholly the case in *H Ins. Co.* v. *Sherwood*, 72 Mo. 461. In fact, under the Ameri rule, executed contracts, even though *ultra vires*, if not wh illegal, are generally upheld on the ground of equitable estop Green's Brice Ultra Vires, 729, note *a*.

These elements are missing in the case at bar, if we are cor in our view that the conditions prescribed by the National B Act are essential requisites to the issue of legally valid stock. is not pretended in the answer that two-thirds of the stockhol of the bank ever voted for an increase of the stock to $430,0 and whether they ever would have done so, even if the bank

continued in business, rests on bare conjecture. That they never can do so, the bank having been dissolved, is conceded. It is not pretended that the Comptroller of the Currency ever issued his certificate signifying his approval of the increase to $430,060, even if he had the legal power to do so, which proposition, under the admitted facts, we must deny. That the bank could not issue or make a valid sale of the new stock, unless the requirements of the law were complied with at some time or other, is self-evident; such sale at best was voidable, and upon the termination of the possibility of its validation by matter subsequent became void.

It will be seen, upon a careful examination of the case of *Delano* v. *Butler*, 118 U. S. 645; *ante* 163, that the opinion and decree of the Supreme Court is in no way opposed to the views herein expressed. Under the law as it then stood, every condition requisite to a valid increase of the capital stock of the Pacific National Bank had been complied with prior to the time when the defendant was called upon to respond to his obligations as a stockholder. True it is that such conditions had not been complied with when the defendant paid for the stock and accepted the certificate, but they were fully complied with thereafter; he had full knowledge of the fact that they had been then complied with, and that he was considered a stockholder, and with knowledge assented to the reduced amount of stock, and voluntarily paid the assessment imposed by the stockholders upon themselves to secure the further continuance of the bank in business. It was only when the bank became finally insolvent that he sought to repudiate his obligation. The parties there had the legal power to waive the condition and waived it by their concurrent action, and after such waiver the contract, even if voidable before, became fully executed, and the defendant became a shareholder upon the plainest principles of an equitable estoppel. The defendant received his certificate, acting as a shareholder, and could not equitably assume the position that the corporation was estopped from denying his rights as a shareholder if successful in its enterprises, and yet he was not estopped from repudiating his duties as a stockholder if the corporation was unsuccessful.

The position of the receiver in this case is the reverse. His contention practically asserts that as between the bank and

the plaintiff, the bank could enforce plaintiff's liability as a s
holder, but the plaintiff was powerless to enforce his rigl
such. That the bank could retain the plaintiff's money wi
giving him any thing in return, even though that money
paid by the plaintiff upon the sole consideration of the sto
be issued, and even though by the very terms of the act
plaintiff was bound to pay the money into the bank before
stock for which the money was thus paid came in legal exist

The receiver further contends that the allegations in the an
which were adjudged bad on demurrer are sufficient to show
there was a *de facto* increase of the stock, if not one *de j*
and that the same rule should govern this case which gov
subscriptions to the stock of *de facto* corporations. To mai
the position, the case of *Chubb* v. *Upton*, 95 U. S. 665, is m
relied on, and the following language used by Mr. Justice H
quoted, and stress laid on the sentences which are printe
italics: "*It is settled by the decisions of the courts of the Un
States, and by the decisions of many of the State courts, tha
who contracts with an acting corporation cannot defend hi
against a claim on such contract in a suit by the corporatio
alleging the irregularity of its organization. The rule appl
increasing the stock of the corporation, when the question a
upon paying his subscription for stock forming a part of
increase. The duty and necessity of performing the contra
subscription are the same as in the case of an original stockhol

How far a stockholder in a suit by a creditor of the cor
tion, or by one representing creditors, which was the cas
Chubb v. *Upton*, may estop himself by his subscription to
tion the legal validity of the contract depends on circumsta
When the defense is equivalent to a plea of *nul tiel* corpora
it is generally disallowed on the ground that a contract ent
into with a corporation in its corporate name is an admissio
its corporate existence. It is disallowed when it militates ag
the well-established doctrine that the capital stock of a corpor
is a trust fund for the payment of its creditors. We know o
case however which goes to the extent that in a suit by a co
ration to enforce a subscription against one who has never a
as a member of the corporation, and never participated in its

ceedings in any manner, the defendant may not raise any defense which questions the validity of the contract. The case of *Kansas City Hotel Co.* v. *Hunt*, 57 Mo. 130, decides that he may, and the case of *Haskell* v. *Worthington*, 94 id. 560, decides that he may even in a suit by creditors. This position is not controverted by any thing that is decided in *Chubb* v. *Upton*. In that case, as the court found, the defendant had participated in the organization and management of the corporation, "had paid his money, received his certificate of stock, had attended meetings, voted, acted as an officer, and so far as the record shows, never repudiated his position at any time even to the time of trial."

In *Eaton* v. *Bank*, 144 Mass. 260; *ante* 483, the facts of the case were identical with those of *Delano* v. *Butler*, *supra*, with the exception that the subscriber for part of the increased stock had not by his subsequent acts recognized the validity of the reduction in the increase which was claimed to have been brought about by the concurrent action of the bank and the Comptroller of the Currency, and the Supreme Court of Massachusetts by a unanimous opinion held that the subscriber became no stockholder, notwithstanding the subsequent validations of the stock, to which he never assented. The opinion, although opposed to a dictum in *Delano* v. *Butler*, seems logically correct, and is ably supported by reference to many decided cases. The case at bar is stronger in its facts in plaintiff's favor, because here no validation ever took place, or ever can take place hereafter.

It is not essential for us to decide whether the receiver in this controversy represents the bank only, or whether he represents its creditors likewise, in a sense making his rights superior to those of a bank. We fully recognize the fact that circumstances may surround a transaction of this character, which would estop a subscriber to question the validity of his subscription as against creditors, even though they had no such effect when the controversy was one between himself and the bank. *McDermott* v. *Donegan*, 44 Mo. 85; *Skrainka* v. *Allen*, 7 Mo. App. 434; 76 Mo. 384, 392. But this is no such case.

The allegation in the answer, that the plaintiff voluntarily paid his subscription, states no fact from which an estoppel can arise in favor of a creditor, since he was bound to do so by the man-

dates of the law prior to becoming a stockholder, and his d so was in no sense an assertion that he was a stockholder alr The fact that the bank advertised that its stock had been incr to the amount of $430,060, and included in the said amount stock subscribed for by plaintiff with his knowledge and con can have no such effect, since plaintiff was powerless to pre any such action on part of the bank prior to his becoming a s holder. The officers and directors of the bank were not agents of the plaintiff in making these declarations, nor had parties who had been misled thereby any right to rely the *Scovill* v. *Thayer*, 105 U. S. 143, 151. Whether a publica with plaintiff's knowledge and consent, stating in terms that p tiff was a stockholder to a certain amount, would have such e it is unnecessary to decide, since no such allegation is made. might make a different case, in presenting an element of fr which in the present instance is wholly wanting.

It results from the foregoing that the part of defendant's swer demurred to states no legal defense to the action, and the demurrer was properly sustained.

Upon the trial of the remaining issues the court rendered j ment against the receiver for the amount paid by plaintiff bank to be paid out of the assets in his hands in the course of ministration. This was correct and in conformity with the co adopted under similar circumstances in *Eaton* v. *Bank*, *su* If the plaintiff is not a stockholder, he is a creditor. That action for money had and received can be maintained under circumstances has been decided by this court in *Keane* v. *Be* 11 Mo. App. 20, and has been uniformly so decided both here elsewhere in a variety of cases, where money was paid by party in consideration of an act to be done by another, and wh the act was not done. *Kerrigan* v. *Kelly*, 17 Mo. 275; *Whe* v. *Board*, 12 Johns. 363; *Carter* v. *Carter*, 14 Pick. 424; *Je* v. *Railroad*, 10 Ind. 539; *King* v. *Hutchins*, 28 N. H. 561.

There is no error in the record and with the concurrence of the judges, the judgment is affirmed.

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NICHOLS v. STEPHENS.

(32 Mo. App. 330.)

Stock — increase — subscribers' rights and liabilities.

ROMBAUER, P. J. The questions arising in this case are similar to those discussed and decided at the present term in the case of *Schierenberg* v. *Stephens*, *ante* 528. The pleadings herein are substantially the same as in that case, except that it is not averred in defendant's answer, that the advertisements by the bank stating that its capital stock had been increased were made with the plaintiff's knowledge and consent. The defendant's answer was not demurred to as in the *Schierenberg Case*, but the plaintiff took issue by reply, denying the affirmative defense.

The case was tried as a proceeding in equity, and the court upon the hearing rendered judgment against the receiver.

It is needless to set out the evidence in detail, since it is conceded by counsel for the receiver that the allegations of plaintiff's petition have been substantiated by proof, and that unless the facts set up by way of affirmative defense are legally sufficient to debar plaintiff's recovery he is entitled to judgment. We have held in the *Schierenberg Case* that the affirmative plea was insufficient in law, which of itself disposes of this appeal in respondent's favor.

There was nothing in the proof adduced to enlarge the claim made in the receiver's answer, or to give any additional strength to the claim of an equitable estoppel on plaintiff's part. On the contrary it appears affirmatively that the plaintiff was never recognized as a stockholder by the bank. The bank kept an account of the aggregate amounts paid on account of the proposed increase of stock under the heading "Subscription paid, increase of capital stock." It affirmatively appeared that although the bank reported from time to time the amounts paid in on those subscriptions to the Comptroller of the Currency, it never reported its capital stock as exceeding $300,000, but reported the excess as "paid in and not certified to." It was not shown that the plaintiff knew any thing of the advertisements and cir-

culars of the bank which stated that the capital stock had ncreased, and it appeared affirmatively that the Comptroll the Currency took no action touching the actual increase never issued any certificate approving it, but in his last offici port preceding the suspension of the bank stated its capital to be $300,000 only.

It will be thus seen that the judgment of the trial court h was warranted regardless even of the fact whether the affirm defense was sufficient in law, since the affirmative defense wa substantiated by the evidence.

Judgment affirmed. All concur.

STEPHENS v. SCHUCHMANN.

(32 Mo. App. 333.)

Insolvency — indorser — set off of deposit.

In an action by the receiver of an insolvent National bank against the in of a promissory note maturing after his appointment, the defendant c set off a deposit in the bank.

APPEAL from St. Louis City Circuit Court.

Draffen & Williams and *D. W. Shackleford*, for appella

Klein & Fisse, for respondent.

PEERS, J. The plaintiff instituted this action to recover certain notes held by him as receiver of the Fifth National of St. Louis, amounting together to the sum of $1,500, exec by the defendant Schuchmann, and indorsed by the defen Soderer. The facts of the execution and indorsement of the were admitted; but the defendant Soderer in his separate an pleaded a set-off against the plaintiff's claim as follows: "And a further and additional defense to the several causes of actio forth in the plaintiff's petition, and as a set-off and counter-c to the same, this defendant says that on the 7th day of No

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ber, 1887, this defendant had on deposit in the said Fifth National Bank of St. Louis, the sum of $1,236.58, which amount was on said 7th day of November, 1887, due and payable from the said Fifth National Bank of St. Louis, to this defendant. The defendant further says that the said sum of money is still due him from the said Fifth National Bank of St. Louis, and that on or about the 13th day of January, 1888, this defendant notified the said plaintiff Lon V. Stephens, receiver of the Fifth National Bank, that he stood ready and consented that the said receiver should apply the balance that was due to this defendant from the said Fifth National Bank, and so standing to his credit in said bank, namely, the said sum of $1,236.58, in satisfaction and payment *pro tanto* of the two notes mentioned and described in the first and second causes of action of the plaintiff's petition herein, and on said day this defendant did then and there tender in cash to the said Lon V. Stephens, receiver as aforesaid, the difference between the amounts of said notes and the protest-fee thereon, and interest accrued to said date, amounting in all to $1,509.60, on the day of said tender amounted to the sum of $273.02, which last-named sum was on said day tendered to the said plaintiff by the defendant in satisfaction and discharge of all liability on the part of this defendant upon said notes; but the said plaintiff, receiver as aforesaid, refused and declined to accept said sum of $273.02 in satisfaction and discharge, and refused to allow this defendant the said set-off or counter-claim of $1,236.58, so due him from the said bank. And this defendant now here offers and pays into court for the benefit of said plaintiff the said sum of $273.02, and consents that judgment may be rendered against him for said amount with costs. Wherefore, having fully answered, this defendant now prays judgment accordingly, that the said plaintiff may be required to deliver and surrender to him the said two promissory notes upon payment of said $273.02, the balance due thereon, as aforesaid, from this defendant, and for such other and further relief as the defendant may be entitled to under the circumstances of this case.

The notes sued on having been introduced, the defendants were proceeding to offer testimony in support of the set-off pleaded when plaintiff's counsel admitted the truth of the matters

pleaded in the answer. Thereupon the court rendered judg in favor of plaintiff as follows: Upon the first count of the tion for the sum of $1,004.77, and upon the second count fo sum of $504.33, amounting in all to the sum of $1,509.60 the court rendered judgment upon the counter-claim in fav the defendants for the sum of $1,236.58, and awarded an e tion in favor of the plaintiff for the amount of the differenc tween the two findings, to-wit, the sum of $273.02, and fo costs of the suit. From this judgment the plaintiff appeals.

It will be seen that there is but one question presented in record, viz.: Whether the set-off pleaded was properly all against the plaintiff's claim. There can be no question, unde statutes of this State, that one of two defendants jointly may plead as a set-off a separate demand due him from the p tiff. The Supreme Court of this State has so held in a li decisions beginning with the case of *Austin* v. *Feland*, 8 Mo. and continuing up to the case of *Mortland* v. *Holton*, 44 id and we know of no contrary authority in any of the later decis It seems however that the question as here presented is not erned by the statute of this State nor the decisions upon statute, but must be determined by the act of Congress under w the plaintiff bank was authorized to transact its business, and decisions of the court as bearing upon that act.

The act of Congress prescribes the conditions upon which tional banks shall be created, the powers they possess and c quences of their failure to meet their obligations. In our j ment persons dealing with these institutions can only acquire enforce rights against them under the limitations designate the act above referred to.

Section 5234 of this act provides for the appointment of ceiver of an insolvent bank, who, under the directions of Comptroller of the Currency, shall take possession of the bo records and assets of every description of such association, co all debts, dues and claims belonging to it, sell its real and sonal property and pay over the money to the Treasurer of United States, subject to the order of the Comptroller of Currency. Provision is then made for a ratable dividend of money so paid over to him by such receiver on all such claim

may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and shall make further dividends as the proceeds of the assets are paid over to him, and the remainder of the proceeds, if any, shall be paid to the shareholders. In order to further secure an equal distribution of the assets of the bank, section 5242 declares all transfers of the notes, bonds, bills of exchange owing to any National banking association, or of deposit to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.

It is perfectly clear from this that the act of Congress establishing these banks intended: "1. To secure the government for the payment of the notes; and 2. To secure equality among the creditors of the bank in the division of the property and proceeds thereof; that there should be no preference of one creditor above another; all should share ratably in the proceeds of the association. The provisions are just and equitable and commend themselves to the mind of every lover of equal and exact justice." Mr. Justice FIELD, in *National Bank* v. *Colby*, 21 Wall. 609; 1 Nat. Bank Cas. 109, says: "This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors, so studiously provided for in the act, would in that case be lost."

If the theory of the lower court is correct, then its judgment has the very opposite effect of that clearly intended by the National Bank Act, *i. e.*, in giving the indorser of the note in question credit for the entire amount of his deposit while the other creditors must be satisfied with just what the assets of the bank will pay, whether it be ten, twenty or fifty per cent. To illustrate: A. has $1,000 to his credit on the books of the bank; B. has $2,000; C. has no deposit, but owes the bank a note of $2,500 on which B. is indorser; the bank fails and is put in the hands of a

receiver; A. must be satisfied with what the dividends of the will pay on his $1,000 deposit; while B. on account of hi dorsement for C. tenders $500 more, which with the credit deposit pays off the note of C. and saves to himself the amount of his deposit; C. then protects his paper by repay to B. and the result is clear. Such a proposition is the one b us. It defeats the very object of the law and cannot be u by any rule of fairness and justice.

At the time of the failure of this bank the liability o indorser on this note had not become fixed His was a contin liability. The indorser owed the bank nothing at the time it into the hands of the receiver; the note was not due. The of action against him first accrued to the receiver. He did stand at the time of the collapse of the bank, in the attitude debtor, owing an immature demand, but at the time his liab was contingent. One cannot set off a demand due him fro insolvent bank against a liability that has become fixed sinc appointment of a receiver. *Jordan* v. *Bank*, 74 N. Y. 467 Am. Rep. 319. The receiver succeeds to the rights of the existing at the time it goes into liquidation. *Bank* v. *Wal* Me. 167; *Miller* v. *Bank*, 1 Paige, 444; *Colt* v. *Brown*, 12 233. The right of the set-off must be perfect and availabl the time of the appointment of the receiver in order not t affected by the bank's insolvency. *Hade* v. *McVay*, 31 St. 231; 1 Nat. Bank Cas. 353. The same principle is enunci by NELSON, J., in *Fry* v. *Evens*, 8 Wend. 530; also in *Me* v. *Seamen*, 6 N. Y. 168.

When a banking association, organized under the Ban Laws of Congress, becomes insolvent and passes into the han a receiver under the provisions of that law, the respective ri and liabilities then existing between it and its creditors and deb becomes fixed, and all its property and assets thereupon sub after satisfying the prior claims, if any, of the government o count of its notes, to disposal and ratable distribution among its general creditors upon its principle of equality. No subseq lien can be created, or right of preference obtained in respec any such assets or property after the appointment of a rece *Balch* v. *Wilson*, 25 Minn. 299.

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The rights of the parties to this suit then must be decided with reference to the condition of things existing when Stephens was appointed receiver and took charge of the bank. The note not being then due the liability of the indorser was not fixed and the right of set off did not exist, and not existing at the time of the appointment of the receiver it is quite clear that it does not spring into life afterward. *Trust Co.* v. *Harris*, 2 Bosw. 76; *Clark* v. *Brockway*, 3 Keyes, 13; *Matter of Middle District Bank*, 1 Paige, 585; *Clarke* v. *Hawkins*, 5 R. I. 219.

If this note had matured before the failure of the bank and had been paid, the proceeds would have passed into the hands of the receiver as cash assets, subject to be equally and ratably distributed among the general creditors of the association after settlement of the prior claims of the government according to the provisions of the National Banking Law. The money would have gone into the receiver's hands and this indorser would have come in for his deposit upon an equality with all the other creditors of the bank. The desire of the maker of this note to secure to his indorser the payment of his deposit in full may be a very laudable one; it is one however which in view of the provisions of the National Banking Law cannot be consummated. The notes must be paid, and the indorser will receive his ratable share of the proceeds, but he can have no preference over other creditors. The unmistakable force and meaning of the Banking Act is to place all unsecured creditors upon the same footing of equality when the receiver was appointed. The indorser of the note in question was in the line of unsecured depositors to whom payment, the bank being insolvent, was prohibited; he, at that time, had no right of set-off nor any equity against the note not then matured, which passed to the receiver. To allow the set-off now that the note has matured, and thereby make payment in full to the defendant indorser in discharge of his obligation to the bank, would, in our judgment, be contrary, not only to the policy of the law, but also to the plain meaning of its provisions. *Bank* v. *Taylor*, 56 Penn. St. 14; *Armstrong* v. *Scott*, 36 Fed. Rep. 63.

We have not been unmindful of the points so well raised in the brief of the respondents, nor have we neglected to carefully examine each and all of them, together with the authorities

cited; but we find nothing in them to justify us in depa from the provisions of the "National Bank Act," and the ions of the various courts bearing thereon. On the adm facts the judgment of the trial court is erroneous as a concl of law, and the same will be reversed and the cause remand be disposed of as indicated herein.

All concur.

Commissioners of Silver Bow County v. Davis.

(6 Mont. 306.)

Taxation — in Territories — equalization.

Shares of National banks in the Territories are taxable like other perso In Minnesota stocks or shares in any bank or company are taxable where the entire capital stock is invested in property assessable in the tory; in Bow county mining claims not patented were not taxed, and patented were assessed at $5 an acre; the entire capital of a large nu of mining companies were assessable, and part of their property was ing claims; defendant's shares of bank stock were assessed at the m value. *Held*, that there was no discrimination.

APPEAL from District Court, Silver Bow county. Acti recover taxes. Judgment for plaintiff. Defendant pealed.

Knowls & Forbis, for appellant, Davis.

W. W. Dixon, for respondent, Board of Commissioners of ver Bow county.

Wade, C. J. This is an action by the plaintiff and respon to recover the sum of $1,562.75 from the defendant and a lant for taxes levied for the year 1885 upon certain shares of capital stock of the First National Bank of Butte, owned by appellant. The cause was tried upon the following agreed s ment of facts:

"(1) That the First National Bank of Butte is now, and during all of the year 1885, and before that time, a corpora

duly created under and by virtue of the laws of the United States relating to National banks, and located and carrying on a general banking business in Butte City, in the county of Silver Bow and Territory of Montana, and that the capital stock of said bank is $100,000, divided into shares of $100 each.

"(2) That during all of said year 1885 the said defendant, Andrew J. Davis, was the owner and holder of nine hundred and forty shares of the capital stock of said bank, and that said shares were, during all of said year, and are now, of the true value in money at private sale, and of the market value (which is the same), of $125 each.

"(3) That for and in the said year 1885 there was duly levied and assessed, according to the laws of Montana Territory, in said Silver Bow county, for territorial, county and other purposes, upon all property in said county subject to taxation, an *ad valorem* tax, amounting in all to thirteen and three-tenths mills on each dollar of assessed valuation.

"(4) That said nine hundred and forty shares of stock of the said First National Bank of Butte were assessed for taxation, in the manner provided by the laws of said Montana Territory for the said year 1885, to said defendant, Andrew J. Davis (who then owned and held said shares in said county of Silver Bow), at their estimated true value in money at private sale, and at their market value (which is the same).

"(5) That the said defendant has not, nor has said bank, or any one for him or it, ever paid said tax on said shares so assessed as aforesaid, or any part of said tax.

"(6) That in the general assessment of said Silver Bow county for said year 1885, shares of stock in corporations generally were assessed in accordance with the provisions of section 1003 of chapter 53 of the fifth division of the Revised Statutes of Montana Territory, as amended by the act of the Legislative Assembly of February 22, 1881, on page 67 of the Laws of 1881; and where the entire capital stock of any incorporated company was invested in assessable property in said Territory, such stock, or the shares thereof, were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent from the United States,

were assessed at the government price of $5 per acre, wit
regard to their true market value; that there are a large nu
of mining corporations in Montana Territory whose entire ca
stock is invested in assessable property, and that part of said p
erty consists of mining claims."

There was a judgment for the plaintiff for the amount clai
from which the defendant appeals, and asks for a reversal of
judgment, for the reasons, viz.: First, that under the provis
of the General Banking Act, shares of stock in National bank
the Territories are exempt from taxation; and, second, tha
the laws of Montana, and by the showing of the agreed staten
of facts, there has been an unjust discrimination against the
pellant in the taxation of his shares of National bank stock.
of these questions arise under the following section of the
tional Banking Act:

"SEC. 5219. Nothing herein shall prevent all the shares in any associ
from being included in the valuation of the personal property of the own
holder of such shares, in assessing taxes imposed by authority of the
within which the association is located; but the Legislature of each
may determine and direct the manner and place of taxing all the shar
National banking associations located within the State, subject only to
two restrictions that the taxation shall not be at a greater rate than i
sessed upon other moneyed capital in the hands of individual citizens of
State, and that the shares of any National banking association owned by
residents of any State shall be taxed in the city or town where the ban
located, and not elsewhere. Nothing herein shall be construed to exemp
real property of associations from either State, county or municipal t
to the same extent, according to its value, as any other real proper
taxed." R. S. Mont., § 1015.

1. The proposition of the appellant is, that by virtue of
section, the right to tax National bank shares is limited to
tional banks located and doing business in a State, and that s
shares are not subject to taxation in a Territory. In constru
this section, reference must be had to all the sections, and to
general scope and meaning of the act of Congress authorizing
establishing our National banking system. The sections or
ferent parts of every statute must be construed together, an
they are modified by one another. If the object and intent
the statute is distinctly defined and clearly expressed, ordin
words will be given such a meaning, if they have such a me

ing, as to make them harmonize with such object and intent, even though they might be so interpreted as to be in conflict therewith. The word "State" has various meanings. It may mean a place; it may mean an organized political community. If used in the latter sense, the word might mean the same as Territory, for that is also an organized political community.

The general scope and purpose of this act of Congress was to give to the people of the United States, whether they lived in a State or in a Territory, a uniform system of banking, whereby they should be authorized to form associations for carrying on that business. It requires such associations in their certificates to name the place where its operations of discount and deposit are to be carried on, designating the State, Territory or district, and the particular county, city, town or village. § 5134. Here the words "State, Territory or district," mean simply the place — the locality — in which the business is to be carried on.

The right to form such associations is made a privilege — a franchise — which is distributed equally among the people of the States and Territories, according to the population of either (see §§ 5178–5180); and every association is allowed to charge and to receive interest at the rate allowed by the laws of any State, Territory or district where the bank is located. § 5197. Penalties for the violation of any of the provisions of the act, by the officers of any banking association, are the same, whether such violation occurs in a State or Territory. § 5239.

The banking system created and established by the act extends alike to the States and Territories. The Constitution and laws of the United States, which are not locally inapplicable, have the same force and effect in the Territories as elsewhere within the United States. U. S. R. S., § 1891. The Territories are as much a part of the United States as are the States. There is but one banking system for all. No provisions of the Banking Act are locally inapplicable to the Territories. The legislative powers of the Territories extend to all rightful subjects of legislation. It is just as competent for a Territorial Legislature to determine and to direct the manner and the place of taxing personal property as it is for a State Legislature to do the same thing. In this respect their powers are alike. Either may levy and assess taxes upon

property subject to taxation within its jurisdiction. Each
raise a revenue by taxation for carrying on the local governm
The National banking system extending over each alike, it w
seem that the words of section 5219, "in assessing taxes imp
by authority of the State within which the association is locat
ought to be interpreted to mean the legislative authority, or
authority within the locality in which the banking associatio
situated that may rightfully and legally levy and assess taxes
personal property. Otherwise burdens are imposed upon ban
associations in the States, and exemptions are allowed to the
the Territories, which would be inconsistent with the whole s
of the act, which was designed to give a uniform system
every locality. If this interpretation of the word "State
correct, then there are no restrictive words in section 5
which is a part of chapter 3 of the act, and is controlled
section 5157, which provides that chapters 2, 3 and 4, w
are expressed without restrictive words as applying to '
tional banking associations," or to "associations," apply t
associations organized to carry on the business of banking
der any act of Congress. If this interpretation is not cor
then, by virtue of the same section, the real estate of any b
ing association in a Territory is exempt from taxation, and by
tue of section 5242 attachments and injunctions may issue ag
banking associations before final judgment if located in a T
tory. And so if the word "State" means one of the Un
States, and not the place in which the banking association
cated, then, while the Comptroller of the Currency, by vi
of section 5181, is given authority to equalize the currenc
a State according to the population, he has no such powe
the Territories.

These incongruities are avoided, and the act made consi
and harmonious by giving to it a uniform operation in
States and Territories, which can be done without viola
any of its words or phrases, and which was the evident
pose of Congress when it provided a banking system for
people of the United States.

2. The second proposition is that by the laws of Mon
and by the showing of the agreed statement of facts, there

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been an unjust discrimination against the appellant in the taxation of his shares of National bank stock. The statute of the Territory concerning property subject to taxation provides, among other things, for the taxation of "stocks or shares in any bank or company, incorporated or otherwise, and when by any other State or Territory, and whether situated in this Territory or not, except that where the entire capital stock of any incorporated company shall be invested in assessable property in the Territory of Montana, such stock shall not be taxed." 12 Sess. L. 67.

The sixth finding of fact is, in substance, that in the year 1885, in Silver Bow county, shares of stock in corporations generally were assessed in accordance with the provisions of the foregoing statute; and where the entire capital stock of any incorporated company was invested in assessable property in the Territory, such stock or the shares thereof were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and where held under patent were assessed at government price of $5 per acre without regard to the market value; that there are a large number of mining corporations whose entire capital stock is invested in assessable property; and that part of said property consists of mining claims. It is also found as a fact that nine hundred and forty shares of stock in the First National Bank of Butte, in said county, were assessed and taxed for the year 1885 at the market value, and at the same rates as other property in said county.

Shares in corporations represent the capital stock. If the capital stock is taxed the shares ought not to be; and if the shares are taxed the capital stock ought to be exempt. If both are taxed, there will be double taxation To prevent this the Legislature provided that if the entire capital stock was in the Territory and assessable the shares should be exempt. The converse of this would be true, that if the capital stock was not assessable the shares would be subject to taxation. If the capital stock was not within the Territory, and therefore not assessable, or if it was exempt from taxation by law, the result would be the same, and the shares would be subject to taxation. National bank shares are taxable, but the right to tax them is subject to the condition

that the taxation shall not be at a greater rate than is ass upon other moneyed capital in the hands of individual citi § 5219, R. S. U. S.

How is other moneyed capital in the Territory taxed? T the first thing to be determined, in order to ascertain if the tion of bank shares is an unjust discrimination. The ag statement of facts shows that there are a large number of mi corporations in the Territory, whose entire capital stock is inv in assessable property, and that part of said property consis mining claims assessed for taxation at the rate of $5 per without regard to market value. The capital stock being ass ble and subject to taxation, the shares, which merely repr such capital stock, are and ought to be exempt. Otherwis same property would be taxed twice for the same year. B for any reason, the capital stock of these corporations coul be reached for taxation, then the shares would become asses under the statute of the Territory. National bank stock is in condition. It is not subject to taxation. It is represente government bonds, which are exempt, and hence bank share assessable the same as the shares in other corporations whose tal stock is not invested in the Territory; and in order to sho unjust discrimination against bank shares, it would be necessa show that the taxation of such shares resulted in a high greater tax upon the money invested than results in the tax of the capital stock of these corporations whose capital sto assessable in the Territory. It is immaterial whether the tax is upon the shares or upon the capital stock if the tax upo money invested is equal.

Mining claims are real estate, and it is legal for National b to purchase and to hold such claims. If other corporations i in such claims, and they are taxed at the rate of $5 per acre out regard to the market value, there is no unjust discrimin against National banks, unless the mining claims which they own are taxed at a higher rate. Nothing of this kind appea the agreed statement of facts.

It is said in appellant's argument, that it may be safel serted that no corporation formed under the laws of Mon and doing business in the Territory, but has its entire capital

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invested in assessable property in the Territory, and that the shares of stock in such corporations are exempt from taxation. Taking this statement to be true, it simply shows that the capital stock is taxed instead of the shares, but does not touch the proposition that the shares ought to be exempt where the capital stock is not taxed. Suppose the capital stock is not in the Territory or assessable here—and that is the case in hand—the fact that the shares in other corporations whose capital stock is assessable in the Territory are exempt from taxation has no bearing on the question. The inquiry is as to an unjust discrimination against bank shares. If money is invested in such shares and taxed at the same rate as money invested in mining or other corporations, then there can be no just cause of complaint, because in one case the money is taxed as shares, and in the other as capital stock. There is no discrimination against a bank where its capital stock is taxed in the form of shares, and in favor of other corporations whose shares are exempt, but whose capital stock is taxed. In either case the moneyed capital of the corporation is taxed, and it does not make much difference by what name it is called. It would be an unjust discrimination in favor of National banks not to tax their shares (their capital stock being exempt), while at the same time subjecting to taxation the capital stock of other corporations whose entire capital stock is invested in assessable property in the Territory. Shares in National banks are taxable, even though the entire capital stock is invested in United States bonds, which are exempt from taxation. *Van Allen* v. *Assessors*, 3 Wall. 573; 1 Nat. Bank Cas. 1; *People* v. *Commissioners*, 4 Wall. 244; 1 Nat. Bank Cas. 9. It is not shown that the entire capital stock of the bank of the appellant, or that any part of such stock, is invested in assessable property in Montana, whereby its shares of stock become exempt.

The board of commissioners of each county sits as a board of equalization to hear complaints and to adjust and to equalize taxation, but it is not shown that the bank or the appellant ever appeared before such board to have the assessment on these shares reduced or remitted, or to show that there was a discrimination against the bank in assessing these shares. If it had been shown there, or here in the agreed statement of fact, that the capital

stock of the bank was invested in assessable property in the
ritory, or that it owned property in the Territory which had
assessed at a higher rate than that of similar property belo
to other corporations in the Territory, or that such deduction
not been made as had been allowed to such other corpora
then there would have been just cause of complaint. If
were no deductions to be made from the amount of the ta
tax would be legal, even though the statute prohibited the m
of authorized lawful deductions. The denial of a right is
jury to him who has no right to enforce.

Says Justice MILLER in *Supervisors* v. *Stanley*, 105 U. S.
ante 33: "What is there to render it [the statute of New
void as to a shareholder in a National bank who owes no
which he can deduct from the assessed value of his shares.
denial of this right does not affect him. He pays the
amount of tax that he would if the law gave the right of d
tion. He would be in no better condition if the law exp
authorized him to make the deduction. What interest has
a question that only affects others? Why should he invok
protection of the act of Congress in a case where he h
rights to protect?"

The statute of the Territory is not invalid because it su
bank shares to taxation and exempts the shares of other co
tions. In order to affect its validity it would be necessa
show that there is an unjust discrimination in the amount o
tax upon the money invested in bank shares and money inv
in the shares of other corporations in the Territory; and thi
not be shown while it appears that in one case the money is
at equal rates as shares, and in the other, as capital stock inv
in the Territory.

The appellant has no legal interest in the question as to
money invested in other corporations in the Territory is
unless he can show that his money, invested in bank sha
taxed at a greater rate, thereby making an unequal discrimi
against his investment. Such discrimination does not appe
the following reasons: (1) It is not shown that the bank ha
of its capital stock invested in assessable property in Mon
(2) It is not shown that it is the owner of any mining c

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taxed at a greater rate than the mining claims of other corporations in the Territory. (3) It is not shown that any deductions were denied in taxing the bank shares that were allowed to other corporations of the Territory. (4) It is not shown but what the taxation of bank shares is just equivalent to the taxation of other corporations whose entire capital stock is invested in assessable property in the Territory. (5) It does not appear that money invested in bank shares is subjected to any higher or greater rate of taxation than any other moneyed capital invested in the Territory. (6) On the contrary it does appear that if the entire capital stock is assessable in the Territory, the shares which represent such stock ought to be exempt, and that if the capital stock is exempt for any reason, the shares, in order that there may be no discrimination in their favor, ought to be taxed. (7) If money invested in a National banking association or other corporation is taxed at the same rates as other property, it is immaterial whether the tax is levied upon the shares which represent the capital stock, or upon the capital stock itself. In either case the same result is arrived at and the money invested is subject to the same and equal taxation. (8) The right to form banking associations being a privilege of great value, by means of which large profits are earned for the shareholders, this right or privilege is property, and the shares become subject to taxation though the capital stock is exempt; and so a banking association has the same relation to the statute of the Territory as would any other corporation whose capital stock was not invested in assessable property in the Territory, in which case the shares would be subject to taxation.

The judgment is affirmed, with costs.

First National Bank of Tecumseh v. Overman.

(22 Neb. 116.)

Jurisdiction — penal actions.

Actions and proceedings against any National bank may be brought in State, county or municipal court in the county or city in which such ciation is located, having jurisdiction in similar cases, to enforce a pe under section 5198, U. S. R. S.

ERROR from Johnson county.

T. Appleget & Son, for plaintiff.

Osgood Bros., for defendant.

Maxwell, C. J. The defendant in error brought an actio the District Court of Johnson county against the plaintiff i ror, under section 5198 of the Revised Statutes of the Un States, to recover $100 as a penalty under said section. plaintiff in error demurred to the petition upon two grou *First*, that the court did not have jurisdiction of the sub matter; *second*, that the petition did not state facts sufficie constitute a cause of action. The demurrer was overruled, judgment for $100 rendered in favor of the defendant in e The only error assigned in this court is the want of jurisdic of the trial court. Section 5198 of the Revised Statutes of United States provides "that suits, actions and proceed against any association under this title may be had in any cir district or territorial court of the United States, held wi the district in which such association may be established, an any State, county or municipal court in the county or city in w said association is located, having jurisdiction in similar cas This section removes the impediment to the exercise of juris tion created by the act of 1789 (U. S. R. S., § 711), and pressly confers jurisdiction on the State courts, as above specif concurrent with the Federal courts in "suits, actions and proc ings against any association under the Banking Act." The

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utes of the United States extended over every State as a part of its laws; and although exclusive jurisdiction may be given to the Federal courts, yet if it is not so given, either expressly or by necessary implication, the State courts having a competent jurisdiction in other respects may be resorted to. *Hade* v. *Mc Vay*, 31 Ohio St. 236; 2 Nat. Bank Cas. 353; *Kinser* v. *Bank*, 58 Iowa, 728; *Ordway* v. *Bank*, 47 Md. 217; 28 Am. Rep. 455; 1 Nat. Bank Cas. 559; *Claflin* v. *Houseman*, 93 U. S. 130; *Gruber* v. *Bank*, 87 Penn. St. 468; 30 Am. Rep. 278; 2 Nat. Bank Cas. 382; 19 Alb. L. J. 137; *Pickett* v. *Bank*, 32 Ark. 346; 2 Nat. Bank Cas. 209; *Dow* v. *Bank*, 50 Vt. 112; 28 Am. Rep. 493; 2 Nat. Bank Cas. 421; *Bletz* v. *Bank*, 87 Penn. St. 87; 30 Am. Rep. 343; 2 Nat. Bank Cas. 366.

Authority is expressly conferred on the State courts having jurisdiction in similar cases.

It is very strenuously contended on behalf of the plaintiff in error that Congress cannot impose duties on the State courts, and that therefore they had no authority to act in the premises. But Congress has not sought to compel the State courts to act in a case like that under consideration, nor has it sought to impose duties upon them. It simply confers the authority — in effect permits them — to hear and determine such cases, but without compulsion. 1 Kent Com. 400. The State courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction, derived from their Constitution under the State law. *Claflin* v. *Houseman*, 93 U. S. 130.

The State tribunals therefore have jurisdiction. There is no error in the record and the judgment is affirmed.

The other judges concur.

Schuyler National Bank v. Bollong.

(24 Neb. 821.)

Pleading — verification — attorney's clerk — joinder of causes — sep stating and numbering. Usury — action for penalty — pleading - diction — venue.

A notary public, who is clerk of an attorney, may administer an oath t a pleading prepared by such attorney.

Where several causes of action are set forth in a petition without beir rately stated and numbered, it is error for the court to overrule a m the defendant to require the plaintiff to separately state and num causes of action. This is a statutory right which, unless the defend waived, he may insist upon.

When an action is brought to recover a penalty under sections 5197 and S. R. S., for taking, receiving, reserving or charging a rate of interest than is allowed by law, it is necessary to allege in the petition t act was "knowingly done."

An action to recover a penalty under section 5198 may be brought in a in the city or county in which such bank is located, having jurisdi similar cases.

ERROR to District Court, Colfax county, Marsha Action under Revised Statutes United States, s 5197, 5198, to recover double the amount of usurious inter Hector C. Bollong against Schuyler National Bank. F judgment for the plaintiff, defendant brings error.

E. T. Hodsdon, for plaintiff in error.

C. J. Phelps and *J. A. Grimison*, for defendants in err

Maxwell, J. This action was brought on the 19th March, 1887, by the defendant in error against the plain error, in the District Court of Colfax county, to recover, sections 5197 and 5198 of the Revised Statutes of the States, double the amount of interest paid on certain us contracts. On the trial of the cause the court found that t fendant in error had paid to the plaintiff in error "the s $912.42, and that the same was usurious, as in said petit

leged." The court thereupon rendered judgment in favor of the defendant in error, and against the plaintiff in error, for the sum of $1,824.84, "being double the amount so as aforesaid charged, taken and received."

The first ground of error assigned is the overruling of the motion of the plaintiff in error to strike the petition from the files, on the ground that the record shows "that the affidavit verifying the petition was made before one Clifton C. Sabin, a clerk of C. J. Phelps, one of the attorneys of record in the above-entitled action." Section 118 of the Code, as it existed at the time the verification was made, authorized any person "before whom a deposition might be taken" to administer the oath. The statute does not seem to prohibit a notary in the office of an attorney from administering an oath verifying a pleading prepared by such attorney. The motion therefore was properly overruled. In this decision we do not intend to qualify what has been said by the court in *Payne* v. *Briggs*, 8 Neb. 79, as under our Code the verification of a pleading is to a great extent a matter of form.

2. The petition contains a large number of causes of action. These several causes are not separately stated and numbered as required by section 93 of the Code. The defendant below (plaintiff in error) filed a motion to require the plaintiff below (defendant in error) to separately state and number his causes of action. This motion the court overruled, to which the plaintiff in error excepted, and now assigns the same for error. The motion to separately state and number the causes of action should have been sustained. A large number of the causes of action had accrued more than two years before the bringing of this suit, and had they been separately stated and numbered, would have been subject to demurrer. This right the defendant below was deprived of by the ruling of the court. A plaintiff cannot jumble his causes of action together, and in answer to an erroneous overruling of a motion to separately state and number, say that no injury has resulted from such ruling. Section 93 provides "that where the petition contains more than one cause of action, each shall be separately stated and numbered." Each cause of action set out in a petition must show that the defendant is liable to the plaintiff upon the matter stated in that count, and where

objection is made, the plaintiff should be required to file a
tion in due form.

3. Section 5198 of the Revised Statutes of the United S
provides "that the taking, receiving or reserving or charging
of interest greater than is allowed by the preceding section,
knowingly done, shall be deemed a forfeiture of the entir
terest which the note, bill or other evidence of debt carries
it, or which has been agreed to be paid thereon. In cas
greater rate of interest has been paid, the person by whom
been paid, or his legal representative, may recover back, in
tion in the nature of an action of debt, twice the amount o
interest thus paid from the association taking or receivin
same; provided such action is commenced within two years
the time the usurious transaction occurred." There is no state
in the petition that the bank knowingly contracted for and rec
a greater rate of interest than is allowed by law, nor are
other words which are equivalent thereto. The right to re
is made to depend upon this condition, and this court has no
to waive the making of such allegation. The petition ther
fails to state a cause of action in that regard.

4. The plaintiff in error contends that the State courts ha
jurisdiction, that being conferred exclusively on the Federa
bunals. In *Bank* v. *Overman*, 22 Neb. 116; 34 N. W.
107; *ante* 556, we held that the State courts do have jur
tion. That decision was rendered after a careful examinati
the decisions of the several courts, both State and National,
we believe it to be correct. It will therefore be adhered to.
there must be a new trial, it is unnecessary to consider the
assignments of error.

The judgment of the District Court is reversed and the c
remanded for further proceedings. The other judges concur

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Schuyler National Bank v. Bollong.

(24 Neb. 825.)

ERROR to District Court, Colfax county, Marshall, J.

E. T. Hodsdon, for plaintiff in error.

C. J. Phelps and *J. A. Grimison*, for defendants in error.

Maxwell, J. The questions involved in this case are the same as those presented in the case of *Bank* v. *Bollong*, *ante* 558, and the same ruling will be made thereon. The judgment of the District Court is reversed and the cause remanded for further proceedings. The other judges concur.

Schuyler National Bank v. Bollong.

(24 Neb. 825.)

Usury — penalty — State courts — jurisdiction — usurious discount. Evidence — memoranda to refresh memory.

The courts of record of the several States have jurisdiction in actions brought under sections 5197, 5198, of the Revised Statutes of the United States, to recover from National banks the penalty for knowingly taking, receiving, reserving or charging a rate of interest greater than is allowed by law.

Where the usurious interest is discounted from the face of the note, the bank can only recover the face of the note less the interest deducted. If the borrower pays the usurious interest in advance, he may recover double the interest so paid.

Memoranda to refresh the memory of a witness must have been made recently after the fact in regard to which he testifies. Memoranda prepared by the attorneys of the witness several months after the occurrence of the facts testified to, from other evidence in possession of the witness, are not admissible to refresh his memory.

ERROR to District Court, Colfax county, Marshall, J. Action under Revised Statutes United States, sections 5197, 5198, to recover penalty by John G. Bollong against Schuyler

National Bank. From judgment for plaintiff, defendant b
error.

E. T. Hodsdon, for plaintiff in error.

C. J. Phelps and *J. A. Grimison*, for defendant in error.

MAXWELL, J. On the 16th day of August, 1887, the de
ant in error brought an action against the plaintiff in error, i
District Court of Colfax county, to recover the penalty, u
sections 5197 and 5198 of the Revised Statutes of the U
States, for receiving, etc., usurious interest. On the trial o
cause in the court below judgment was rendered in favor o
defendant in error for the sum of $402.80.

The first objection of the plaintiff in error is that the
courts have no jurisdiction of the subject-matter of the action.
question was before the court in *Bank* v. *Overman*, 22 Neb.
34 N. W. Rep. 107; *ante* 556, and the jurisdiction was
tained. It is said (22 Neb. 116, 117; 34 N. W. Rep. 1
"Section 5198 of the Revised Statutes of the United States
vides 'that suits, actions and proceedings against any associ
under this title may be had in any circuit, district or terri
court of the United States, held within the district in which
association may be established, and in any State, county or
nicipal court in the county or city in which said association
cated, having jurisdiction in similar cases.'" This sectio
moves the impediment to the exercise of jurisdiction create
the act of 1789 (U. S. R. S., § 711), and expressly confers j
diction on the State courts, as above specified, concurrent
the Federal courts, in "suits, actions and proceedings against
association under the Banking Act." The statutes of the U
States extend over every State, as a part of its laws; an
though exclusive jurisdiction may be given to the Federal co
yet if it is not so given, either expressly or by necessary imp
tion, the State courts, having competent jurisdiction in othe
spects, may be resorted to. *Hade* v. *McVay*, 31 Ohio St.
2 Nat. Bank Cas. 353; *Kinser* v. *Bank*, 13 N. W. Rep.
Ordway v. *Bank*, 47 Md. 217; 1 Nat. Bank Cas. 559; *Cl*
v. *Houseman*, 93 U. S. 130; *Gruber* v. *Bank*, 19 Alb. L. J.

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87 Penn. St. 468; 30 Am. Rep. 378; 2 Nat. Bank Cas. 382; *Pickett* v. *Bank*, 32 Ark. 346; 2 Nat. Bank Cas. 209; *Dow* v. *Bank*, 50 Vt. 112; 28 Am. Rep. 493; 2 Nat. Bank Cas. 421; *Bletz* v. *Bank*, 87 Penn. St. 87; 30 Am. Rep. 343; 2 Nat. Bank Cas. 366. The statute confers authority on the State courts, and clothes them with jurisdiction to try cases of this character. The first objection therefore is overruled.

2. The second error assigned is that the court permitted the defendant in error to recover twice the full amount of interest paid by him to the defendant. The amount of recovery depends upon the provisions of section 5198, which declare "that in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same." Under the Banking Law of February 25, 1863, usury forfeited the entire loan or debt. This however was deemed too severe, hence the act of 1864 was passed, which is sections 5197, 5198 of the Revised Statutes of the United States. These sections limit the rate to that "allowed by the law of the State, Territory or district where the bank is located, and no more," except, etc. The penalty under the act of 1864, for charging illegal interest, is "the forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon;" and where the greater rate of interest has been paid, twice the amount thereof may be recovered back by the person paying the same, or his legal representatives. *Hill* v. *Bank*, 15 Fed. Rep. 433; *Crocker* v. *Bank*, 4 Dill. 358; 1 Nat. Bank Cas. 317; *Bank* v. *Garlinghouse*, 22 Ohio St. 492; 1 Nat. Bank Cas. 811; *Bank* v. *Overholt*, 96 Penn. St. 329, *post* ; *Gray* v. *Bennett*, 3 Metc. 522; *Wiley* v. *Starbuck*, 44 Ind. 298; *Bank* v. *Karmany*, 98 Penn. St. 65; *post* ; *Bank* v. *Trimble*, 40 Ohio St. 629; *Bank* v. *Dearing*, 91 U. S. 29; 1 Nat. Bank Cas. 117. In this case the testimony clearly shows that the defendant in error had paid to the plaintiff in error more than $200 on the usurious contracts set out in the petition. The court therefore did not err in rendering a judgment for twice the amount so paid.

3. It is claimed that the court permitted the defendant in e to testify from a paper called "Memoranda," prepared for by his attorneys. The courts are not in entire harmony as to character of the memoranda from which a witness may refresh memory. The better rule however seems to be that the n and memoranda should have been made up by the witness at moment or recently after the fact. If they were made up at distance of months thereafter, ordinarily they will not be ficient. In other words, where a party relies upon memorand refresh his memory, it must appear that at the time he prep the memoranda he knew it to be correct; and that from s knowledge, with his memory so refreshed, he is enabled to tes from recollection as to the original facts. Any thing referre by a witness to refresh his memory must be shown to the adv party, if so desired, and he may cross-examine the witness ther but it is not required to put the paper in evidence. *Pec Lake*, 3 Lans. 136; *Tibbetts* v. *Sternberg*, 66 Barb. 201. Me randa prepared by the attorneys for the defendant in error is shown to have been of such a character as would have justi the defendant in error to have refreshed his memory from same. The witness however testified almost entirely from own memory of the events stated, and no prejudicial error se to have occurred from the partial use of the memoranda. Th is no error in the record, and the judgment is affirmed. other judges concur.

Bressler v. Wayne County.

(25 Neb. 468.)

Taxation — stock — allowance for debts of holder.

In the assessment and taxation of shares of National bank stock, the ow thereof, having no other credits or moneyed capital, are entitled to de their *bona fide* debts from the value of such shares of stock.

Reese, C. J. The facts in this case are conceded to be that the 1st day of April, 1887, and prior thereto, the plaintiff

error was and had been a resident of the precinct of Wayne, Wayne county, Nebraska, and was on the said date the owner of two hundred and twenty-nine shares of the capital stock of the First National Bank of Wayne county, Nebraska, of the par value of $100 each, of the total value of $22,900. Said bank is a corporation duly organized and existing under and by virtue of the laws of the United States, under the act known as the National Bank Act. U. S. R. S., 1874, tit. 82. On or about the 1st day of April, 1887, the plaintiff in error gave a list of his taxable property to the assessor of Wayne precinct, which list included the number of shares of said stock first mentioned, and at the same time gave to such assessor a list of debts owing by him, duly sworn to, amounting to $14,200, and asked that the last-mentioned amount be deducted from the value of the bank stock owned by plaintiff in error, he having no other credits from which he could deduct such indebtedness, and that he be taxed and assessed only upon the residue of said shares, viz., eighty-seven shares. The assessor refused to allow such deduction, and returned and assessed against plaintiff in error the whole number and amount of said shares, such shares being assessed at $25 each, without deducting the indebtedness referred to. On the 6th day of June, 1887, plaintiff in error appeared before the board of county commissioners of Wayne county, sitting as a board of equalization, and made application to have his assessment corrected by allowing him the deduction for debts, owing, as before mentioned, which application and request was by said board refused. On the 16th day of January, 1888, said plaintiff in error filed a petition in error in the District Court of Wayne county, and the same question was submitted to the court, and the decision of the county board was by that court affirmed. Plaintiff now assigns the said ruling of the District Court as error, and claims that he should be, and by law is, entitled to deduct from the value of his shares of stock in said National bank his *bona fide* debts, and he be taxed only upon the residue. Section 27, chapter 77, of the Compiled Statutes, entitled "Revenue," and under which the right to offset plaintiff's indebtedness is claimed, is as follows: "In making up the amount of credits which any person is required to list for himself, or for any other person, company or corporation, he shall

be entitled to deduct from the gross amount of credits the amou
of all *bona fide* debts owing by such person, company or corpor
by it to any other person, company or corporation for a consider
not secured, but to acknowledgment of indebtedness not founde
on actual consideration believed, when received, to have been a
against and to such acknowledgment made for the purpose of b
or to assessors, shall be considered a debt within the meaning
of any liability as surety fo
be deducted as the person making out the statemer
is legally and equitably bound and will be compelle
on account of the inability or insolvency of the principa
and if there are other sureties, who are able to contribut
only so much as the surety in whose behalf the statement
will be bound to contribute; provided, that nothing in th
section shall be so construed as to apply to any bank, company
corporation exercising banking powers or privileges, or to autho
the any deductions allowed by this section from the value of an
other item of taxation than credits." The proviso at the end
the section has no bearing upon this case, as the law for the tax
tion of banks is to be found elsewhere in the chapter referre
to. It is provided by section 5219 of the Revised Statutes of th
United States, that the taxation of shares in National banks sha
not be at a greater rate than is assessed upon moneyed capital i
the hands of individual citizens of the States where the banks ar
located. The statute of the State of New York governing the a
sessment of property required the board of assessors to prepar
an assessment-roll, in which there shall be set opposite the nam
of each tax payer (1) all his real estate liable to taxation, and it
value; (2) the full value of all his personal property, after deduc
ing the just debts owing by him. The Court of Appeals of tha
State held, in *People* v. *Dolan*, 36 N. Y. 59, that by that sec
tion, and another which need not be here copied, no deductio
from the value of shares of National bank stock could be made o
account of indebtedness of the tax payer. But in *Supervisors*
Stanley, 105 U. S. 305; *ante* 33, the Supreme Court of th
United States held otherwise, and refused to accept *People*
Dolan as authority. In the case of *Hills* v. *Bank*, 105 U. S
319; *ante* 45, the same conclusion was reached; and in *Bank*

Britton, from Indiana, 105 U. S. 325; *ante* 48, under a statute of that State, almost like our own, the doctrine was reaffirmed; and it was there held "that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

In the following cases it has been held by the Supreme Court of the United States that the authority of the States to tax the shares of National bank stock is derived wholly from the act of Congress permitting it, and that without the consent of Congress such bank stock shares could not be taxed by State authority at all. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 id. 738; *Weston* v. *Charleston*, 2 Pet. 449; *People* v. *Weaver*, 100 U. S. 539–543; 2 Nat. Bank Cas. 57. By this it will be seen that the question for decision is not one of the construction to be placed on a law of this State but upon a law of Congress, thus becoming a Federal question, upon which the Supreme Court of the United States is the court of last resort, and therefore binding on us. The same question was before the Supreme Court of Indiana in *Wasson* v. *Bank*, 8 N. E. Rep. 97; and the rule of the Supreme Court of the United States in the cases cited was followed. In that case it is said: "There can be no doubt that under these decisions all credits of whatever nature, which includes the credits from which the tax payer may deduct his *bona fide* debts, as here decided, whether interest-bearing or not, are moneyed capital, in the sense in which the term is used in the act. And under these decisions, also, statutes which allow the tax payer to deduct his debts from such moneyed capital, and deny this right to the holders of shares of National bank stock, must yield to the paramount act of Congress, which inhibits such discrimination." Substantially the same question was decided by the Supreme Court of California in *Miller* v. *Heilbron*, 58 Cal. 133; *ante* 330, in the same way. See also *Ruggles* v. *Fond du Lac*, 10 N. W. Rep. 565; *Richards* v. *Rock Rapids*, 31 Fed. Rep. 505; *Whitbeck* v. *Bank*, 127 U. S. 193; 8 Sup. Ct. Rep. 1122; *ante* 309; *Bank* v. *Paducah*, 5 Cent. L. J. 347; 1 Nat. Bank Cas. 300; 2 Flip. 61. In addi-

tion to the fact that we are bound by the decisions of the Sup
Court of the United States as being the supreme law of the
many of the State courts have, as we have seen, adopted the
rule. The judgment of the District Court is therefore reve
and the cause remanded for further proceedings in accor
with law.

The other judges concur.

Norton v. Derby National Bank.

(61 N. H. 589; 60 Am. Rep. 334.)

Guaranty by bank of contract between third persons.

No action may be maintained against a National bank upon a contract by its cashier on its behalf to guarantee a contract between third pe for delivery of building materials.

ACTION on a guaranty. The head-note and opinion sho necessary facts.

Wiggin & Fuller, for plaintiff.

G. C. & G. K. Bartlett, for defendants.

Allen, J. The defendants' cashier had no authority to the guaranty, and there was nothing in the acts, conduc course of business of the defendants' officers, by which he held out as having authority to make it. The guaranty itsel ing false and a fraud upon both parties, the cashier undertoo cure one fraud by committing another, and recorded a false of authority to make the guaranty, and certified the false re to the plaintiff.

Had the forged record been a true one; had the directors v as the record and certificate declared, or had they made the anty themselves, the defendants could not have been bound their action, for a guaranty of that kind would have been be the scope of their powers. The power of corporations is lim

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by the purposes for which they are created, and which are named in the charter or act authorizing their existence. National banks derive their powers from what is known as the National Banking Law (act of Congress, June 3, 1864, U. S. R. S., title 62), declaring that any association organized under the act shall be a body corporate, and

"may exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as may be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

Real estate may be purchased and held for immediate accommodation in the transaction of business, and received in the collection of debts, and as security for previous indebtedness. U. S. R. S., §§ 5136, 5137. The power given by the law is to carry on the banking business, and includes such incidental powers as may be necessary to effect that object. It is nowhere mentioned that a bank may guarantee the performance of written contracts made for other purposes than the payment of money or the transfer of securities. If in the course of their business, the bank find it necessary to indorse for transfer, or otherwise specially guarantee negotiable commercial paper (*People's Bank* v. *National Bank*, 101 U. S. 181; 2 Nat. Bank Cas. 97), it will not be claimed that the guaranteeing of other written contracts is included within any of its powers, general or special, or is necessarily incidental. It is no part of the business of a bank, nor necessarily incidental to it, to guarantee a building contract, or one for furnishing building materials; and the defendants had no power to make the guaranty which is the subject of this action.

The plaintiff claims that the defendants are liable, because it was the duty of their cashier and clerk to record the votes and official acts of the directors, and the bank are bound by the false record as if it were true; or that the plaintiff in good faith parted with her property, relying upon the strength of the record and the guaranty, and the defendants are estopped from denying the truth of the record and the validity of the guaranty. The doctrine that principals are bound or made liable for the wrongs done

by their agents or servants is confined to cases where the act plained of, or relied on, are done in the employment of the cipal as a part of the ordinary business of that employment, authorized or directed by the principal, or in some way r and adopted by him. Acts, though done by an agent or se unauthorized and unratified, and not being within the sc the employment, nor a part of the ordinary business of the cipal, cannot bind him nor make him liable; and the doctri plies with special force to corporations, the business of can be carried on only through the medium of agents. A Ames Corp., §§ 310, 311; Add. Torts, § 1197; *Martin* v. *Falls Mfg. Co.*, 9 N. H. 51, 54; *Salem Bank* v. *Gloucester* 17 Mass. 1; 9 Am. Dec. 111; *Foster* v. *Essex Bank*, 17 479, 508; 9 Am. Dec. 168; *Mechanics' Bank* v. *Bank* lumbia, 5 Wheat. 326; *Bank* v. *Dunn*, 6 Pet. 51; *Bank* v. 8 id. 16; *United States* v. *City Bank of Columbus*, 21 356. The defendants' cashier had no authority to mak guaranty, nor was his act in making it ever ratified by t fendants. The directors in fact repudiated it as soon as it to their knowledge. It was no part of the duty of the c to make the guaranty, nor was its making any part of the nary business of the bank. Nothing of the kind was sho have ever been done before, either with or without express tion. It was not within the legalized powers of the defen

The fact that it was a part of the duty of the cashier to r the acts and votes of the directors does not make his false r and certificate binding upon the bank. The cashier is not a lic officer within the meaning of the term, appointed by the p to make and certify records, and whose duties are defined by If he was held out by the defendants as their agent to recor show the acts of their officers, the plaintiff was not reliev the duty of making inquiry into the legality and want of auth of the acts. The doctrine, that of two innocent persons defra by a third, he shall suffer who has enabled a delinquent to mit the fraud, has no application here, where the act constit the fraud was no part of the cashier's duty nor the defend legitimate business, and where the plaintiff neglected to mak necessary inquiry for ascertaining the validity of the act.

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The doctrine of *ultra vires* is not usually applied where the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defense. *Rich* v. *Errol*, 51 N. H. 350, 354; *West* v. *Errol*, 58 id. 233; *United States* v. *State Bank*, 96 U. S. 33; *Gold Mining Co.* v. *National Bank*, id. 640; 1 Nat. Bank Cas. 151; *National Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12; *Bank* v. *Whitney*, 103 U. S. 99; *ante* 5. The defendants received a tract of land which the plaintiff conveyed, relying for payment of the consideration on the guaranty of the defendants. The guaranty, the conveyance and the pledge of the note and mortgage were parts of the same transaction, and though the land was not received directly from the plaintiff, it was the false guaranty which induced and made possible the conveyance, and which enabled the bank to collect the overdraft of Lamprey. It was a benefit received from the guaranty, and the defendants cannot be permitted to repudiate the unauthorized contract and retain the fruits of it. If the guaranty is denied, the benefit must be restored. The plaintiff cannot recover upon the guaranty. If he desires, he may amend his declaration by adding an appropriate count for the recovery of the land, or its value if sold.

All concur except SMITH and CARPENTER, JJ., who did not sit. Case discharged.

CONWAY v. HALSEY.

(44 N. J. L. 462.)

Stockholder — action against directors for negligence.

A stockholder in a National bank cannot maintain an action against the president and directors for their neglect and mismanagement of the affairs of the bank, whereby insolvency ensued and the stock became worthless.

IN Supreme Court, before BEASLEY, C. J., and DIXON, MAGIE and PARKER, JJ. The declaration was to the effect that the defendants, directors of the Mechanics' National Bank of Newark, had permitted the cashier of said bank to control and manage the

business of the bank and to apply the money and property
bank as suited his inclination, and without reasonable supe
of the defendants, whereby the said cashier was enabled a
make away with the entire capital of said bank and it
largely insolvent, to the damage of plaintiff, a stockholder.

C. Borcherling, for plaintiff.

John W. Taylor, for defendants.

Beasley, C. J. Since the decision in the case of *Smith* v.
reported in 12 Metc. 371; 46 Am. Dec. 690, and which occu
the year 1847, I do not find that it has anywhere been doubt
an action will not lie in behalf of a stockholder in a corp
against its directors for their negligence in so conducting its
that its capital had been impaired or lost and the shares
stock in that manner rendered worthless.

That judgment, with respect to its constituent facts, wa
tical with the transaction described in the present declarati
the complaint in that instance was that the directors of a co
company had by their malfeasance in delegating the whol
trol of its business to its president and cashier, occasion
waste and loss of its entire capital. The adjudication was
on general principles which lie at the basis of all corpor
istence. These were in substance the following, viz.: Tha
is no legal privity between the holders of shares in a corpo
in their individual capacity, on the one side, and the direct
such company on the other; that the directors are not the
agents or trustees of such several stockholders; that the c
tion is a distinct person in law, in whom all the corporate pr
is vested, and to whom all its agents and officers are resp
for all torts and injuries diminishing or impairing its pro
that the individual members of the company have no ri
power to intermeddle with the property or concerns of such
pany, or to call any agent or officer to account, or to dis
them from any liability; that the injury done to the capi
wasting it, is not in the first instance nor necessarily a dam
the stockholders; that all sums which could in any form
covered on that ground would be assets of the corporation,

applied in the first instance to the payment of debts, the surplus only being distributable among the stockholders, and that it is therefore only an indirect, contingent and subordinate interest in damages so to be recovered that is vested in shareholders. These are the main grounds leading to the decision in the case referred to, and such grounds are so plainly just and reasonable that they appear to have been adopted in each of that series of authorities on the subject that are to be found by a reference to any of the text-books. Thomp. Liability of Directors, 351; Field Corp., § 328.

The legal effect of the doctrine thus established is that those acts of the officers and agents of the corporation which diminish or destroy the capital of the company are direct injuries to the corporate body, and that it only can seek reparation for such wrongs. And in such cases, if the directors or other principal officers are the wrong-doers, or if not, being thus implicated, they refuse to promote the requisite suit, a stockholder, acting for himself and the other stockholders and for the company, may call such delinquent officials to account in a court of equity. The theory is that under the given conditions the corporation is entitled to indemnification, and that when this is effected the stockholder ceases to be a loser. As to the right of the shareholder to become the actor in equity to repair a corporate injury, when the directors refuse to perform such function, see the case of *Trenton Bridge* v. *Trenton City Bridge*, 2 Beas. 46.

To the extent of the legal rules established by the train of cases to which reference has been thus made, I did not understand upon the argument that any contention was raised, the plaintiff's case being placed exclusively on the basis of the force of the five thousand two hundred and thirty-ninth section of the National Banking Act. The section thus relied on is in these words: "If the directors of any National banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall however be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that

purpose by the Comptroller of the Currency in his own nar
fore the association shall be declared dissolved. And in ca
such violations, every director who participated in or assen
the same shall be held liable, in his personal and individual
ity, for damages which the association, its shareholders,
other person shall have sustained in consequence of such
tion."

It is insisted that the clause of the above-recited pro
which relates to the violations of this law by the officer
National bank applies to the circumstances stated in this de
tion, and renders the defendants liable to this action. The
tion is not tenable. The act declares that the charter of
these banks shall be forfeitable if the directors knowingly
certain provisions of the statute, and it is for a violation of
provision that a personal responsibility is imposed on such of
When the act of the officers has been such that its effect w
to put the institution out of existence, then, and then onl
they made liable to the private suit of the stockholder or
person injured by their willful disobedience of the require
of the law. As it is entirely unreasonable therefore to infe
it was the legislative intention that the charters of these val
institutions should be liable to be lost by reason of any negli
and want of care of their directors, it necessarily follow
such negligence and want of care will not lay the basis of
of a shareholder against them. The Banking Act organizes
financial institutions, and establishes various fundamental re
tions to which they are required strictly to conform; and
quite in keeping with the purpose and spirit of this law to fi
it a declaration that if the directors should willfully disobe
of such fundamental objections, the penal consequence shou
that they should make good not only the loss thence resulti
the corporation, but also that occasioned to individuals by
malfeasance. The plaintiff's case is not brought within the
of this remedial clause of this section, inasmuch as it doe
show a willful violation of any one of such fundamental re
tions. There is also another objection to the application of
section of this act to the plaintiff's case. When the clau
question gives a private remedy, derived from the misconduc

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the directors, to the individual stockholder, the only reasonable deduction from the words and purposes of the law is, that such redress is aimed at injuries directly and not indirectly falling on such stockholder. In the present case, the injury is indirect and derivative; the plaintiff has suffered a loss because the property of the corporation was squandered, purloined or lost. Now, for such a loss the statute gives to the company the right to obtain an indemnification by suit, and by such recovery the indirect and derivative loss of the stockholders is *ipso facto* repaired.

For the sake of example, let us say that the capital of a bank is $500,000, which is purloined or lost by the misconduct of the directors; the stock thus becomes worthless because the company is made insolvent, but if the corporation sue the directors and recover as damages their entire capital, full value is restored to the stock of the members. It follows therefore that unless we impute to persons passing this act the design to provide for a duplicate reparation for the misconduct of these officers, first, to the corporation, and, then, second, by way of duplication to each member of the bank, it is clear that what I have called these derivative injuries are not those for which an independent remedy is provided in favor of each member of the company. This consideration derives an increase of weight from the circumstance that the same remedy that is given to the stockholders is afforded "to any other person," and if this action can be sustained, so would an action be sanctioned that should be brought by any creditor of the insolvent bank. In the suit of *Ackerman* v. *Halsey*, Mr. Justice DEPUE, sitting in the Essex Circuit, considered this same question, and after having examined the subject with care, as appears from the opinion prepared by him, came to the same conclusion as that above expressed.

It has been deemed advisable to dispose of this case on its legal merits as they were presented in the discussion of counsel at the bar, rather than to confine our attention to the statement of the declaration, which is obviously so imperfect that it does not exhibit the real question in controversy. Regarding the matter in this extended sense, the defendants are entitled to judgment on this demurrer.

TUTTLE v. FRELINGHUYSEN.

(38 N. J. Eq. 12.)

Insolvency — transfer of securities after.

Baldwin, one of the executors and the general financial manager and custodian of the securities of an estate, and also the cashier of a National bank, purchased four accepted bills of exchange. To pay for them he drew his check as executor, on the deposit in the bank to the credit of the estate, and placed in the box containing the papers of the estate, usually kept in the cashier's desk in the bank, the drafts with this memorandum attached: "Est. W. James, loan $25,000, Oct. 26th, 1881. C. Nugent & Co." The proceeds of the drafts were applied to the drawer's indebtedness to the bank. The bank failed and the defendant was appointed receiver. He gave to the executors the box and all its contents except the drafts, which he kept, claiming that they were the assets of the bank. He refused to deliver them on demand, and collected them at maturity, but kept the proceeds separate. *Held*, that Baldwin, in the purchase of the drafts, acted as agent of the drawers, and as executor and not as cashier, and though Baldwin knew at the time that the bank was insolvent, yet the transaction being a *bona fide* purchase and not a plan to secure preference of the estate over other depositors, was not in violation of section 5242 of the Revised Statutes of the United States, which forbids the transfer of any bills of exchange, etc., owing to any National bank * * * after the commission of any act of insolvency, or in contemplation thereof; and further that this court has jurisdiction to follow the proceeds of the drafts as trust property so long as they are identifiable, and to decree their payment to the estate.

BILL for relief. On final hearings on pleadings and proofs.

Cortland Parker, for complainants.

A. Q. Keasbey, for defendant.

The CHANCELLOR. This suit is brought by the executors of William James, deceased, late of Newark, to establish their right to four bills of exchange, each for $6,535, drawn by C. Nugent & Co., of Newark, upon and accepted by L. Beebe & Sons, of Boston, and payable to the drawers, and by them indorsed. They were all payable six months from date, and were respectively dated the 16th, 19th, 21st and 24th of October, 1881. Oscar L. Baldwin, one of the executors, who was the general financial

manager of the James estate and the custodian and depositary of its securities, was also cashier of the Mechanics' National Bank of Newark up to the time of its failure, which occurred on the 31st of the last-mentioned month of October. The defendant was appointed receiver of the institution about the 2d of November following. When he took possession of the bank building he found the drafts in question in a box kept in a desk—the cashier's desk—used by Baldwin in the bank, where it had been left by the latter. The box contained nothing but papers of the estate, or what purported to be such. Among them were two packages of bills receivable, besides the drafts in question, and also bonds of the estate. On the packages of bills receivable were memoranda stating that they belonged to the James estate. To that which was composed of the drafts in question there was attached a paper containing the following memorandum in the handwriting of Baldwin: "Est. W. James, loan $25,000, Oct. 26th, 1881. C. Nugent & Co." The receiver gave up to the executors the box and all its contents, except the four drafts, which he says he felt constrained to retain until after proper judicial determination as to the ownership thereof. Formal demand was made verbally by the executors on him for the drafts, and subsequently on the 13th of April, 1882, they made a written one. The demands were refused. When the latter one was made the defendant had sent the drafts to Boston for collection on his account. On the 26th of October, 1881, the date of making the loan, as stated on the memorandum attached to the drafts, Baldwin drew from the bank, on his check, as executor of William James, $25,000 on account of the deposit ($54,497.91) to the credit of the estate there. The defendant as appears by his answer, collected the drafts as they matured, and now holds the proceeds thereof as part of the assets of the bank, as he claims he has a right to do, but keeps them in a separate account, so that upon adjudication of ownership in this court the identical moneys can be subject to the order of this court. By his answer he sets up two defenses: one is that the purchase of the drafts for the James estate was not *bona fide*, but was in contravention of the provisions of the five thousand two hundred and forty-second section of the Revised Statutes of the United States, which declares that all transfers of the notes, bonds, bills of ex-

change or other evidences of debt owing to any National banking association, or of the deposit to its credit, * * * made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the National Banking Act, or with a view to the preference of one creditor over another, except in payment of its circulating notes, shall be utterly null and void. The other defense is that if the purchase be sustained, this court has no jurisdiction of the matter, because there exists an adequate remedy at law.

That Baldwin bought the drafts with the money of and for the James estate on the 26th of October, 1881, there can be no question. It is also clearly proved that they were the property of C. Nugent & Co., and not of the bank, and that the $25,000 were at once applied to the payment of the indebtedness of that firm to the bank. The drafts were intrusted by the firm to Baldwin in order that he might negotiate them and apply the proceeds for their benefit in their dealings with the bank from which they were borrowers of money. He testified that he acted as agent for them in the negotiation of their business paper, and that it was and had for years been their custom to send to him every day the general receipts of their business, in order that he might deposit such of them as were cash to their credit in the bank, and negotiate such of the paper as was not cash in the bank or elsewhere as he could; that the understanding was that they were to indorse such paper to him, and he was to turn it into cash for their benefit as soon as possible, and either deposit the proceeds in the bank or use them in taking up their obligations at the bank. He received commissions for negotiating the paper. The four drafts were received, he says, on the 26th of October, the day they were negotiated, just as such paper, together with cash items, had been received by him from the firm for several years theretofore. The bank was then insolvent and he was well aware of the fact. He was in hopes however to be able, by management, to prevent the failure of the bank at that time by preventing the bank examiner, of whose coming he was in daily expectation, from discovering the insolvency. He says in substance that he expected, or at least hoped to be able to prevent the dis-

covery up to the night of the 29th of October, three days after the purchase of the drafts. The proceeds of the drafts he used to take up worthless paper, what is known as "kites" (they were drafts drawn by C. Nugent & Co. on a firm in New York, without warrant, and not based on any indebtedness or liability of the drawers), representing loans by the bank to C. Nugent & Co., which he was carrying in his cashier's cash account as so much cash. There is no evidence whatever that in the purchase of the drafts he contemplated any benefit to the estate of James except that which would arise from the investment itself. There is no evidence that he contemplated obtaining any preference for that estate over the other creditors of the bank. His sole object appears to have been to get the money for the drafts for C. Nugent & Co., whose property they were, from the funds of the James estate in the bank, and apply it to the indebtedness of the firm to the bank. At the same time he thought the purchase a very desirable investment for the estate. If he had offered the paper to any person on the street to whom the bank was indebted as a depositor and that person had bought it with a check on the bank which the cashier paid, there could be no ground for holding that the bank had been guilty of a violation of the above-quoted section of the National Banking Act in the transaction. And there is no essential difference between the transaction under consideration and such a one as that. The purchase was not within either the terms or spirit of the section. It was not a transfer of any of the notes, bonds, bills of exchange or other evidences of debt owing to the bank; for, as before stated, the drafts were not the property of the bank. Nor of any deposits to its credit, for the money due the James estate from it was a deposit to its debit. Nor is there any ground for holding that the object of the purchase was to prevent the application of any of the assets of the bank to its debts in the manner provided for by the National Banking Law, or to give a preference to the James estate as a creditor of the bank. But Baldwin's sole object and design as cashier in the transaction were to get the money for the drafts to take up the worthless paper before referred to — to substitute cash for it — before the examiner should enter upon his investigation of the affairs of the institution.

Nor is the objection of the want of jurisdiction well founded. The defendant, who in this transaction stands as a mere volunteer, took into his possession property (the drafts) impressed with a trust, and he held it subject to the trust. He collected the money due upon the drafts and now holds it, keeping it, in the language of his answer, in a separate account, so that upon adjudication of ownership the identical money may be subject to the order of this court. When the bill was filed (April 18, 1882) he held the drafts, none of which had then matured. He has collected them since then. The bill prays that it may be decreed that he came into and holds possession of them wrongfully and without lawful right to take or hold them, and that he acquired them under and charged with a trust whereby it became his duty to hold and collect them, and on such collection to hold the proceeds in trust for the complainants, and that he be prevented from paying over such moneys as he shall receive from the drafts to any one except the complainants, or from making use thereof as his own, and from intermingling them with assets or property held in trust for any other person, or rendering an account thereof to any other person as such. On the same day on which the bill was filed an injunction, according to its prayer, was ordered, and it was issued two days afterward. The drafts were trust property, the property of the James estate, which the defendant took into his possession (with notice) as property belonging to the bank, and the executors sought by this suit to recover them. At the filing of the bill the property was still in the form of drafts. The fact that since then the money due on the drafts has been collected can make no difference as to the complainants' right to relief in this court. Especially is this so in view of the fact that the defendant has kept the proceeds by themselves, capable of identification, to answer the decree of this court. But further the defendant has no personal interest in the matter. He is acting merely as a trustee, and in what he regarded as the proper discharge of his duty as such, took the drafts into his possession and held them as the property of his trust estate. If satisfied that they were such property, he would not only have felt at liberty to distribute the proceeds among those entitled to the assets of the bank, but it would have been

his duty to do so, and he probably would have done it if not restrained by legal proceedings on the part of the complainants. The proper proceedings to that end were those in which he could be restrained by injunction from disposing of the property by distribution or otherwise, and could be required to hold it or its proceeds subject to judicial determination as to its ownership. He held the property and now holds its proceeds under a trust arising by operation of law. Trusts are enforced not only against those persons who are possessed of the trust property rightfully as trustees, but also against all persons who come into possession of the property bound by the trust with notice of the trust. 2 Spence Eq. Jur. 194. In other words, the holder of trust property becomes a trustee of it as soon as he has notice that it is trust property. Not only can the trust property be followed into the hands of third persons, but the proceeds may be followed also as long as they can be traced and identified. Perry Trusts, § 835. Finding the drafts in the bank building, and in the possession of the cashier, the defendant, assuming that they were the property of the bank, claimed them as such, denying that they were the property of the James estate, notwithstanding the ear-mark upon them, and notwithstanding they were found among the securities of that estate, in a receptacle devoted to and used for the keeping of its papers, and notwithstanding, also, that the cashier was an executor of that estate, and it was evident that the estate had bought and paid for the drafts. He thus put the complainants to the proof that the drafts were such trust property, and the object of this suit is to establish that fact. This court, it is needless to say, is the proper forum for the purpose. I have no doubt whatever of its jurisdiction in the matter, nor of the propriety of having recourse to that jurisdiction in this case.

The complainants are entitled to a decree for the amount of the proceeds of the drafts, with interest thereon from the time when they were collected, and they are entitled to costs.

Delaware, Lackawanna and Western Railroad Company v. Oxford Iron Company.

(38 N. J. Eq. 340.)

Lien — on its own stock. Insolvency — evidence of incumbrance.

A National bank, organized under the law of 1864, cannot, even by specific provisions for the purpose in its articles of association and in its by-laws, acquire a lien on its own stock held by its debtor.

A statement in the inventory of an assignee in insolvency that certain stock therein inventoried was "valued at nothing above incumbrances," is not evidence that the assignor incumbered the stock by a pledge to any particular person, and therefore is no evidence for such person to establish a claim to an incumbrance thereon in his favor.

IN insolvency. On petition for allowance of claim against estate.

J. G. Shipman & Son, for petitioner.

Bedle, Muirheid & McGee, for receiver.

The Chancellor. The First National Bank of Washington, at Washington, in Warren county, asks by petition that its claim against the Oxford Iron Company may be adjusted by this court. The particular object of the proceeding is to obtain a decision as to the credits which are to be given upon the claim in respect to certain bonds which the bank holds as collateral security, and as to its right to certain shares of its own stock, fifty in number, standing, at the time of making the decree of insolvency in this case, in the name of Selden T. Scranton, but really owned by S. T. Scranton & Co., of which firm he was a member. He was also president of the Oxford Iron Company. The claim above mentioned is upon two promissory notes, each for $5,000, made by the Oxford Iron Company and indorsed by S. T. Scranton & Co., and a check for $5,000, given by the company to the bank, on which a balance of $412.55 only is due besides interest. The only subject of controversy submitted on the hearing was as to the right of the bank to the stock. Its claim to it is based on an allegation that the stock was assigned to the bank by Selden T.

Scranton by an oral assignment, and that under the by-laws of the bank, of which Selden T. Scranton was a director from the beginning, the bank is entitled to the stock as security for the indebtedness of S. T. Scranton & Co. to it. Selden T. Scranton and the firm of S. T. Scranton & Co. each made an assignment for the equal benefit of his or their creditors, at or about the time of the making of the decree of insolvency against the Oxford Iron Company. The same gentleman who was appointed receiver of that company was appointed by them their assignee. They were largely interested in that company. The stock in question appears in the assignee's inventory of the estate of Selden T. Scranton as follows:

"Fifty shares of the capital stock of the First National Bank, Washington, N. J., $7,000. Valued at nothing above incumbrances."

In the inventory of the estate of S. T. Scranton & Co. accompanying the deed of assignment, it is set down merely as fifty shares of the stock of the bank, and valued at $7,000.

There is a conflict of testimony on the subject of the alleged promise of Mr. Scranton to transfer the stock to the bank as collateral security. Mr. Hann, the cashier of the bank, testifies that on one occasion when he called on Mr. Scranton in reference to the claims and told him the bank had doubts about them and would like to have them secured, Mr. Scranton tried to make him believe that the bank was secure, and said that "if any thing did take place" he would make it secure; that he had the stock, and could and would, if necessary, transfer it to the bank, which would secure it to that extent. He says that on another occasion Mr. Scranton said that he could put the property he owned, and that which the Oxford Iron Company owned at a very low price, and he would still be worth half a million dollars, and Mr. Hann says that Mr. Scranton then said that he had the bank stock and could secure the bank with it, and would, if necessary, at any time do so. He further says that Mr. Scranton, but a very short time before he failed, upon Mr. Hann's having written to him that some paper had been protested and the bank must have it arranged, came to Washington on a Monday afternoon and said he had come to transfer the bank stock nd certain bonds of the Oxford Iron Company (to the amount of $5,000) which the bank

held, and take up the notes; that he, Mr. Hann, told him he was willing to take a transfer of the stock, but was not willing to accept a transfer of the bonds at par without authority from the board of directors; that he, Mr. Hann, insisted that the stock should be transferred, and the matter of the bonds left until he could see the board; that Mr. Scranton said he would come over the following Wednesday; that Mr. Hann should see the board in the meantime about the bonds, and he would on Wednesday transfer the stock and arrange to take up the notes, but he did not come, and soon after that failed; so that the transfer was never made. Mr. Scranton, who is the only other witness on the subject, swears that he has no recollection of ever having made any offer or promise to transfer the bank stock. All that he remembers that he said or did on the subject of securing the bank was to assure the officers that he would protect the bank, without specifying in what manner. He does not however say that he did not say what Mr. Hann swears he did. But upon Mr. Hann's statement, there never was any transfer. There was only a promise to assign the stock, but it was never fulfilled. And it is worthy of remark that the promise of the Monday preceding the failure, which was the last promise, was (as were the others also) upon no consideration, and it was not even an absolute promise, but seems to have been dependent on the action of the board of directors — not to be fulfilled unless they would agree to take the bonds at par.

Attention is directed on behalf of the bank to the statement in the inventory of Mr. Scranton's assignee, that the stock is worth nothing above incumbrances, and it is urged that that is an admission in favor of the claim of the bank. What the incumbrances are which are alluded to does not appear, and if it did, and it were clear that reference was made to the supposed lien of the bank, either by virtue of the alleged promises or under the articles of association or by-laws, the statement would be of no avail to the bank. It establishes nothing, and is no evidence against the trust estate in the hands of the assignee. At most it is an admission on the part of the assignee that the stock is incumbered. But such an admission made in that place would not be binding even on him, where it is not claimed that the state-

ment has any reference to any action on his part. And of course it would not be binding upon the estate in his hands to be administered.

But it is urged that under the articles of association and by-laws of the bank, a lien was created upon the stock for the payment of the indebtedness of the Oxford Iron Company and the liability of S. T. Scranton & Co. as indorsers upon the notes. The stock was not the property of the Oxford Iron Company, but was in fact the property of S. T. Scranton & Co., although standing in the name of Selden T. Scranton. But neither the articles of association, nor the by-laws, nor both together, created any lien upon the stock for the indebtedness of the stockholder to the bank. The articles provided that the board of directors should have power to make all by-laws that it might be proper and convenient for them to make, under the National Banking Act, for the general regulation of the business of the bank and the management and administration of its affairs, and that those by-laws might prohibit, if the directors should so determine, the transfer of stock owned by any stockholder who might be liable to the bank, either as principal debtor or otherwise, without the consent of the board. The by-laws provided that no transfer of stock should be made without the consent of the board of directors by any stockholder who should be liable to the bank either as principal debtor or otherwise, on any obligation due or not due. In *Young* v. *Vough*, 8 C. E. Gr. 325; 1 Nat. Bank Cas. 935, it was held in this court that that very by-law was authorized by the National Banking Law, and was a reasonable one, and that any attempted transfer of his stock by a stockholder, while indebted to the bank, was void, and that an indorser who paid the note by which such debt was created would be subrogated to the rights of the bank as against such shares of its capital stock. The decree in that case was affirmed in the court of last resort, but that court carefully refrained from determining whether the by-law was legal under the law of 1864, or whether, if it was, the indorser had any rights of subrogation, and expressly stated that it was not intended to determine either of those questions, and that they must be considered as unsettled in that court. *Mattison* v. *Young*, 9 C. E. Gr. 535. The decision in this court was ren-

dered at the February term, 1873, and that of the Court of Errors and Appeals in the June term of that year. In October following the Supreme Court of the United States held that a National bank organized under the law of 1864 cannot, even by provisions framed with a direct view to that effect in its articles of association, and by direct by-laws, acquire a lien on its own stock held by persons who are its debtors. *Bullard* v. *Bank*, 18 Wall. 589; 1 Nat. Bank Cas. 93. In that case the controversy was between an assignee in bankruptcy and the bank. It may be remarked that in the case in hand neither of the notes was due when the assignments for the benefit of creditors were made. By force of the authoritative decision just cited the articles of association and the by-laws were powerless to create any lien upon the stock in question.

It will be decreed that the bank is not bound to credit any thing on the claim against the Oxford Iron Company by reason of any lien on the stock.

Judge Stuart, the reporter, appends the following note in his report:

"That a corporation has no lien through its by-laws on its own stock for a debt due from the stockholder to the corporation, see 1 Abb. Dig. Corp. 757; 2 id. 648; Ang. & Ames Corp. (10th ed.), §§ 355, 356, 569-576; 1 Potter Corp., §§ 267-269, and notes; Field Corp., §§ 136-138; Green's Brice Ultra Vires (2d ed.), 15, note *a*; Morse Banks (2d ed.), 505; Overton Liens, §§ 82-86; and the following additional, mostly recent cases: Bank of Louisville v. Bank of N. J., 10 Bush, 367; Myers v. Valley Nat. Bank, 18 Bank Reg. 34; Kahn v. Bank of Mo., 70 Mo. 262; Case v. Bank, 100 U. S. 446; Nat. Bank v. Stewart, 107 id. 626; *ante* 96; Farmers' Bank v. Wasson, 48 Iowa, 336; Hagar v. Union Nat. Bank, 63 Me. 511; 1 Nat. Bank Cas. 573; Bank of Holly Springs v. Pinson, 58 Miss. 421; Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249; Bryon v. Carter, 22 La. Ann. 96; Lee v. Citizens' Nat. Bank, 2 Cin. Sup. Ct. 298; Petersburg Bank v. Lumsden, 75 Va. 327; New Orleans Nat. Bank v. Wiltz, 10 Fed. Rep. 330; Anglo-Cal. Bank v. Grangers' Bank, 16 Rep. 70; Merchants' Bank v. Shouse, id. 442. See however Bachman's Case (U. S. D. Ct. Mo.), 2 Cent. L. J. 119; Knight v. Old Nat. Bank, 14 Int. Rev. Rec. 125; Bigelow's Case, 1 Bank Reg. 667; Stringer's Case, L. R., 9 Q. B. D. 436; New London Bank v. Brockelbank, L. R., 21 Ch. Div. 302; First Nat. Bank v. Hartford Ins. Co., 45 Conn. 22; Planters' Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Mobile Ins. Co. v. Cullom, 49 id. 558; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; Vansands v. Middlesex Co. Bank, 26 Conn. 144; Spurlock v. Pacific R., 61 Mo. 319; Mount Holly Paper Co.'s Appeal, 99 Penn. St. 513; Bohmer v. City Bank, 16 Rep. 411; Peeble's Case, 2 Hughes, 394; Dunlap's Case, 48 L. T. Rep. (N. S.) 89."

National Bank of Auburn v. Lewis.

(81 N. Y. 15.)

Usury — set-off — forfeiture — remedy.

In an action by a National bank on a promissory note discounted by it, the defendant may not counter-claim or set off usurious interest taken by the bank on the discount of it and other notes of which it was a renewal.

The remedy is an action of debt to recover back twice the amount paid.

The practice and pleadings prescribed by the Legislature of the State in regard to a counter-claim or recoupment may not be used to defeat the intention of a Federal enactment.

The provision of the United States Statutes (§ 914) that the practice, pleadings, forms and modes of proceedings, in civil causes, in the Circuit and District Courts, shall conform, as near as may be, to those existing at the time in the courts of record of the State, has no application in such case.

Where a National bank has usuriously reserved a sum greater than the lawful rate of interest on a discount, the amount so reserved is forfeited, and may not be recovered in an action upon the note.

REARGUMENT. The decision upon the former argument is reported in 75 N. Y. 516; 2 Nat. Bank Cas. 305.

Action on a promissory note indorsed by defendant Lewis, for the accommodation of the makers, and discounted by plaintiff.

Lewis answered, plaintiff discounted the same, "and then and there knowingly, corruptly and usuriously deducted therefrom and took, received, reserved and charged, by way of discount, and * * * for the loan or forbearance of the sum of money secured by the note for the time the same then had to run * * * a sum of money much greater than at and after the rate of seven per cent, to-wit, the sum of $160, or thereabouts," and claimed that plaintiff thus forfeited the entire interest.

Evidence of these facts was excluded. Further facts appear in the opinion. Judgment for plaintiff.

Rollin Tracy, for appellant.

E. H. Avery, for respondent.

Per Curiam. A reargument was ordered in this case by reason of the recent decision of the Supreme Court of the United

States in *Barnet* v. *Muncie National Bank of Indiana*, 98 U. S 555; 2 Nat. Bank Cas. 18. In the case cited, the court, in considering the provision contained in section 30 of the National Currency Act of Congress of June 3, 1864 (13 Stat. 99), which relates to knowingly taking, receiving, reserving or charging an illegal rate of interest, holds that two categories are enforced, and the consequences denounced:

1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered.

2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt against the bank taking the same, by the persons paying such illegal interest or their representatives. The court say: "The payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute, we have seen that this could not be done." They further remark, that "the remedy given by the statute for the wrong is a penal suit. To that the party aggrieved must resort. He can have redress in no other mode or form of procedure * * * where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case, and mislead the jury to the prejudice of either party." In the case cited the defendant set up that illegal interest was taken, and claimed to recover twice the amount paid, and the case differs from the one at bar in this respect, as in the latter the defendant averred in his answer that illegal interest was taken, and claimed that the taking, receiving or charging a greater rate of interest than seven per cent was a forfeiture of the entire interest which was taken, received, reserved or charged, and that such interest should be set off against the plaintiff's demand. It will be seen that in the former case the claim was for double the amount, while in the latter it was only for the actual amount paid. A distinction therefore exists between the two cases in this respect, but it is not of such a character, we think, as would authorize a holding that the case cited is not controlling and decisive. It is for the Federal court to determine that question, when it may arise, and in accordance with a well-settled

principle we must follow and stand by its decision upon the main question determined, that in an action brought to recover the amount of a promissory note discounted by a National bank, it cannot be set up by way of counter-claim or set-off that the bank in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took and was paid a greater rate of interest than that allowed by law, and that the remedy in such a case is an action of debt to recover back twice the amount paid.

The counsel for the defendant claims that the question is one of practice, and not the construction of a statute, and that the remedy by way of set-off or rebatement should be upheld; and reliance is placed upon section 914 of the United States Revised Statutes, which provides that the practice, pleadings and forms and modes of proceeding in civil causes, in the Circuit and District Courts, shall conform as near as may be to those existing at the time in the courts of record of the State within which such Circuit or District Courts are held. This provision was intended to bring about uniformity in the law of proceeding in the Federal and State courts, and was merely a rule of practice in reference to the hearing of cases on trial. *Nudd* v. *Burrows*, 91 U. S. 426; *Blease* v. *Garlington*, 92 id. 1; *Ind. & St. L. R. Co.* v. *Horst*, 93 id. 291. It cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character, and render it of no avail. Such a statute has no such connection with or relation to the practice, pleadings or forms of proceedings in civil cases as to render it of secondary consideration in carrying them into effect, and although the State and Federal courts are clothed with concurrent jurisdiction in actions by and against National banks, it by no means follows that the practice and pleadings which the Legislature has prescribed for the State courts, in regard to a counter-claim or a recoupment of mutual demands, shall defeat the object and intention of a Federal enactment. The statute in question is aimed against the receiving or charging of illegal interest, and provides for a forfeiture of the same and for a recovery of double the amount in an action, and upon no principle can it be held that it shall not be enforced because the action is brought upon the instrument affected by it in the State court, and the practice of that court allows a set-off of a claim against

the opposite party. If such was the case, the provision of the statute would be entirely ineffective and useless.

So far there was no error in the rulings at the trial. But the answer set up that in the discount of the note that was sued upon the plaintiff usuriously reserved a sum larger than at the rate of seven per cent per annum, to-wit: the sum of $160. On the trial the defendant sought to prove this fact, but the testimony was rejected and an exception thereto taken. The Federal statute (*supra*) provides that the reserving of usury upon a note shall be held a forfeiture of the entire interest which the note carrries with it. Now when a note is discounted, the amount reserved for the discount is the interest reserved. In most cases it is not then paid. The borrower receives the sum called for by the note, less the amount reserved for the discount. That is not paid until the note is paid. It is interest, and it is interest which the note carries with it. If it be a discount at a usurious rate, it is forfeited by reason of the Federal statute. In a suit on the note, it may not be recovered. It is to be held and adjudged forfeited. The trial court should have allowed the defendant to have put in his evidence, and have found whether the allegation of the answer was true, that the plaintiff reserved, on the making of the loan upon the note in suit, more than at the rate of seven per cent per annum, and whether the note carried that interest with it.

The complaint admits that $114 has been paid upon the note. It does not appear as yet how this was applied. As a rule, it would apply to pay interest first. But if it should appear on a new trial that the $114 was paid, and was in fact or by operation of law applied upon the discount reserved, there would still be a balance of interest reserved and carried with the note. These facts will be brought out on a new trial, and the proper application of them made.

The judgment should be reversed and a new trial granted, with costs to abide event.

All concur.

Judgment reversed.

BRINCKERHOFF v. BOSTWICK.

(88 N. Y. 52.)

Directors — negligence — action for — parties — leave to sue — jurisdiction.

An action may be brought by a receiver of a National bank against its directors to recover damages sustained by their gross negligence.

If the receiver is one of the directors, such action may be maintained by the stockholders, or when they are numerous, by one or more in behalf of all.

It is not necessary to allege in the complaint a direction from the Comptroller, or a demand upon him and a refusal to direct the receiver to bring the action, or a refusal of the receiver to sue.

Such an action may be brought in a State court.

The bank, and the receiver, as such, are necessary parties defendant to such an action.

APPEAL from judgment in favor of defendants, upon an order sustaining a demurrer to plaintiff's complaint. Reported below, 23 Hun, 237. The opinion shows the case.

E. A. Brewster, for appellant.

John Thompson, for respondents.

RAPALLO, J. The complaint charges, among other things, that the defendants Bostwick and others, who were directors of the National Bank of Fishkill, neglected to perform their official duties as such directors, and negligently permitted the money, property and effects of the bank to be stolen, wasted and squandered. That they negligently permitted various persons and corporations who were insolvent and irresponsible to overdraw their accounts to a large amount without security, and negligently permitted the money of the bank to be loaned to irresponsible persons and corporations, without adequate security, whereby said money was lost; that they employed a cashier who was dishonest, unfaithful and incompetent, all of which was known to them; that they neglected to take and keep good and sufficient security for the performance of the duties of said cashier, and of the president and other officers of the bank, and that they so negligently and carelessly conducted its affairs that its entire capital, surplus, property

and effects were lost and the stock rendered worthless, and the stockholders were rendered liable for a large sum of money on account of the unpaid debts of the bank.

The plaintiff avers that he was the holder of sixteen shares of the capital stock, and that by reason of the negligence and misconduct of said directors, he has sustained damage to the amount of $3,200, and each of the stockholders has sustained damages to the amount of double the par value of the stock held by him.

The complaint then sets out the default of the bank in not redeeming its circulating notes, and the appointment by the Comptroller in January, 1877, of the defendant Bostwick as receiver of the bank pursuant to the provisions of the National Banking Act. That such receiver duly qualified and has ever since acted and still continues to act as such receiver, and that before the commencement of this action the plaintiff requested said receiver to bring an action against the said directors for the damages which the bank or its stockholders had sustained by the negligence and official misconduct of said directors, but that he neglected and refused to bring any action against them, or any of them, and that he himself is one of said directors who are charged with misconduct.

The action is brought by the plaintiff in his own behalf, and on behalf of all the other stockholders of the bank; and the judgment demanded is that the damages which the bank and its stockholders have sustained may be ascertained, and that the defendants who were directors of the bank may be adjudged to pay such damages, and that the receiver may collect them for the benefit of the creditors and stockholders, or that the plaintiff may recover his damages and costs, and that the other stockholders who may come in may have such judgment as they are entitled to, etc.

The receiver, the bank and the directors are joined as defendants.

The respondents demurred to the complaint on the ground of want of jurisdiction, improper joinder of parties, want of legal capacity to sue, and failure to show a cause of action.

The Supreme Court at General Term held in favor of the plaintiff on the question of jurisdiction, and the sufficiency of the statement of the cause of action, but sustained the demurrer on

the ground that the demand upon the receiver, and his refusal to bring an action against the delinquent directors, was insufficient to authorize the plaintiff to sue as a stockholder; that the receiver had no authority to prosecute except under the direction of the Comptroller of the Currency, and that in refusing to bring an action he acted in accordance with his duty, the court at the same time expressing the opinion that an improper refusal of the Comptroller of the Currency to prosecute and to direct the receiver to prosecute would entitle the stockholders to sue in their own behalf, making the corporation a party defendant.

The defendants contend that the Comptroller of the Currency and not the receiver was the proper party to bring the action.

It seems to us that the case must turn upon this question. If the defendants are right in their position that the right of action is in the Comptroller of the Currency, the stockholders, as a matter of course, could not sue except in case of his refusal. But if the receiver represents the bank, and is the proper party to prosecute, then we think enough is shown to justify the stockholders in applying directly to the court for relief.

The causes of action set forth in the complaint are losses and misapplication of the funds of the bank through the negligence and misconduct of its directors. For these losses the bank, if still exercising its corporate functions, would have a claim upon the guilty directors which it could enforce by action; but if it refused to prosecute, or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant. *Robinson* v. *Smith*, 3 Paige, 222, 233; 24 Am. Dec. 212; *Greaves* v. *Gouge*, 69 N. Y. 154; Ang. & Ames Corp., § 310. See review of cases in *Heath* v. *Erie Ry. Co.*, 8 Blatchf. 347, 393.

Section 5234 of the United States Revised Statutes provides that upon the appointment of a receiver by the Comptroller, such receiver shall, under the direction of the Comptroller, take possession of the books, etc., of the association, and collect all debts, dues and claims belonging to it, and pay the money collected by him to the Treasurer of the United States. The receiver is the only person authorized by the act to collect dues and claims be-

longing to the bank. Whether special instructions from the Comptroller to the receiver are necessary to enable the receiver to collect or sue for each particular claim, it is not very material, in our view of the case, to inquire. It is sufficient for all present purposes to show that no person but the receiver is empowered by the act, or can be directed by the Comptroller to collect claims belonging to the bank. That the claims set out in the complaint belonged to the bank and could have been enforced by it but for the receivership is too plain to require argument.

The claim that the right of action was vested in the Comptroller rests wholly upon the provisions of section 5239 of the Revised Statutes of the United States, whereby it is enacted that

"If the directors of any National banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the property, privileges and franchises of the association shall be thereby forfeited. Such violation shall however be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency in his own name, before the association shall be declared dissolved.

"And in cases of such violation, every director who participated in, or assented to the same, shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

These provisions are evidently intended to apply to violations by these corporations of the law under which they are organized, and to subject them to the forfeiture of their corporate franchises upon such violations being established by the judgment of a court of the United States. Being organized under an act of Congress, the jurisdiction to declare a forfeiture of their franchises is very appropriately vested exclusively in the courts of the United States, and the Comptroller of the Currency is designated as the officer who shall prosecute for the purpose of having such forfeiture adjudged. It would of course be very inappropriate that such a proceeding should be instituted by a receiver who has only to deal with the assets of the bank, and the requirement that the violation should be adjudged by a court of the United States, at the suit of the Comptroller, is, by the terms of the section, made essential "before the association shall be declared dissolved," but there is nothing in the act which renders it essential for any other

purpose; and it is further to be observed that this is the only provision of the act which authorizes the Comptroller to institute any action in relation to the affairs of a National bank.

The further provision that every director who participates in the violation of the Banking Act shall be personally liable for damages does not in terms require that the action for such damages be brought in a court of the United States, nor that it be instituted by the Comptroller, nor do we think that it has reference to such violations by the directors, of their duties to the bank, as are the subject of this action, but rather to violations of the National Banking Act, by the assumption of powers in excess of the franchises granted, or the disregard of the prohibitions of the act —offenses of the character which usually subject a corporation to the forfeiture of its charter. These are offenses committed by the corporation itself, through its directors and officers, against the government by whom its franchises are granted, and very different in their character from breaches of trust by an officer, agent or trustee of a corporation for which he is responsible only to the corporation or its shareholders. Even if it should be held that where proceedings for the forfeiture of the franchises of the corporation are instituted by the Comptroller under section 5239, he may also proceed against the directors for damages, it does not follow that where there is no proceeding for forfeiture, he is the proper party to proceed against directors or officers for damages for which they are responsible to the corporation. In *Kennedy* v. *Gibson*, 8 Wall. 506, it is said by the Supreme Court that the receiver represents the creditors and the association, and is the proper party to bring suits at law and in equity, and that he may sue in the State courts.

The liability of the directors of corporations for violations of their duty or breaches of the trust committed to them, and the jurisdiction of courts of equity to afford redress to the corporation, and in proper cases to its shareholders, for such wrongs exist independently of any statute. By the Revised Statutes of New York (2 R. S. 462), it is declared that the chancellor has jurisdiction over directors, managers and other trustees, and officers of corporations, to compel them to account for their official conduct in the management and disposition of the funds and property

committed to their charge, and to compel payment by them to the corporation whom they represent, of all sums of money, and the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such trustees. These enactments are however merely declaratory of a jurisdiction long previously conceded to exist, both in this State and in England, and to them were added by further provisions of the Revised Statutes certain visitorial powers not before exercised by the Court of Chancery (except in cases of charitable bodies), viz.: to restrain corporations from exceeding their corporate powers. This latter jurisdiction was that which the Court of Chancery disclaimed in the well-known case of *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. Ch. 389, with reference to which case the provisions of the Revised Statutes just referred to were framed. But in that very case, jurisdiction in cases like the present was conceded to be inherent in the court, and in *Robinson* v. *Smith*, 3 Paige, 222, 233, the power is declared to exist, independently of the provisions of the Revised Statutes, so far as the individual rights of stockholders are concerned, to call directors to account and make satisfaction for losses occasioned by breaches of their trust. This jurisdiction has been continually exercised in England and in this country, and is not of statutory origin. Ang. & Ames Corp., § 312, and cases cited.

The action to recover such losses, as before observed, should in general be brought in the name of the corporation, but if it refuses to prosecute, the stockholders, who are the real parties in interest, will be permitted to sue in their own names, making the corporation a defendant. 69 N. Y. 154. And that course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit. See *Butts* v. *Wood*, 37 N. Y. 317; *Robinson* v. *Smith*, 3 Paige, 222. In such cases a demand upon the corporation to bring the suit would be manifestly futile and unnecessary. A suit prosecuted under the direction and control of the very parties against whom the misconduct is alleged, and a recovery is sought, would scarcely afford to the shareholders the remedy to which they are entitled, and the fact that the delinquent parties are still

in control of the corporation is of itself sufficient to entitle the shareholders to sue in their own names. *Hodges* v. *New England Screw Co.*, 1 R. I. 312; *Heath* v. *Erie Ry. Co.*, 8 Blatchf. 347 If they could not be permitted in such cases to assert their own rights in a court of equity, the directors, so long as they remained in office, could set them at defiance.

In the present case the corporation cannot sue, because all its rights of action have been transferred by operation of law to the receiver. He certainly is not a proper person to whom to intrust the conduct of the action, even did he consent to institute it, or should the Comptroller of the Currency direct him so to do, for he is one of the parties charged with misconduct and against whom a remedy is sought. It necessarily follows that the shareholders must be permitted to sue in their own names, or the wrongs complained of must go without redress, and substantial rights be sacrificed to a mere matter of form. The shareholders are the parties whose interests are involved in the proceeding. If conducted in the name of the corporation or the receiver, it would be as their representative and for their benefit; and when, as in this case, sufficient reasons are shown why it cannot be effectually prosecuted in that form, the right of the shareholders to sue in their own names is sanctioned both by principle and precedent.

Where the shareholders are numerous, the suit may be brought by one or more in behalf of all. *Butts* v. *Wood*, 37 N. Y. 317; *Robinson* v. *Smith*, 3 Paige, 222; *Hichens* v. *Congreve*, 4 Russ. 562; 8 Blatchf. 347.

The jurisdiction of the State court to entertain the action is also challenged by the demurrer. The right of action is not in our opinion derived from the act of Congress, but depends upon general principles of equity; but in any aspect of the case the State courts have concurrent jurisdiction, unless exclusive jurisdiction has been conferred upon the United States courts. *Claflin* v. *Houseman*, 93 U. S. 130; *Robinson* v. *Nat. Bk. of Newberne*, 81 N. Y. 385; 2 Nat. Bank Cas. 309; *National Bank of Gloversville* v. *Wells*, 79 N. Y. 498; 2 Nat. Bank Cas. 333; affirmed in the Supreme Court of the U. S., Jan., 1882; *ante* 25. The jurisdiction of the State courts over actions against National

banks is expressly recognized by the act, and such jurisdiction has been repeatedly exercised in actions by receivers to collect claims due to such banks. There can be no reason why civil actions brought by stockholders in place of the receiver, to enforce claims against delinquent directors or officers, should stand upon any different footing. The only cases in which exclusive jurisdiction is conferred by the Banking Act upon the courts of the United States, so far as we can find, are proceedings to enforce the forfeiture of the franchises of banking associations for violations of the act (§ 5239), and proceedings to enjoin the Comptroller of the Currency from winding up the corporation, through a receiver. There is nothing in the act which withdraws from the jurisdiction of the State courts civil actions to enforce rights of individuals against National banks or their officers. *Cooke* v. *State Nat. Bank of Boston*, 52 N. Y. 96; 1 Nat. Bank Cas. 698; *Bletz* v. *Columbia Nat. Bank*, 87 Penn. St. 87; 2 Nat. Bank Cas. 366. Criminal prosecutions for offenses created by the act stand upon a different footing. Exclusive jurisdiction in such cases is vested in the Circuit and District Courts of the United States by the Judiciary Act of 1789.

The bank was a proper and even a necessary party defendant. *Robinson* v. *Smith*, 3 Paige, 222. It continued to be a corporation, notwithstanding the appointment of a receiver, and the receiver may bring actions in its name. *Pahquioque Bk.* v. *Bethel Bk.*, 36 Conn. 325; 4 Am. Rep. 80; *Kennedy* v. *Gibson*, 8 Wall. 506, *supra*; *Green* v. *Walkill Nat. Bk.*, 7 Hun, 63; *City of Lexington* v. *Butler*, 14 Wall. 283; *Bank* v. *Kennedy*, 17 id. 19. The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy.

We entertain no doubt of the sufficiency of the allegations of the complaint to constitute a cause of action against the defendants who are sued as directors. The rule of liability in such cases is well stated by Chancellor Walworth, in *Robinson* v. *Smith*, 3 Paige, 222: "The directors of a corporation who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good

that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust." See also cases cited in *Cumberland Coal Co.* v. *Hoffman Coal Co.*, 30 Barb. 159; *Cunningham* v. *Pell*, 5 Paige, 607, 613.

The judgment appealed from should be reversed and judgment rendered for the plaintiff on the demurrer, with costs, with leave to the defendants to withdraw the demurrer within thirty days on payment of costs in this court, and in the Supreme Court, and to answer the complaint.

All concur.

Judgment accordingly.

GETMAN v. SECOND NATIONAL BANK OF OSWEGO.

(89 N. Y. 136.)

Bankruptcy — suit by assignee for penalties for taking usury.

Plaintiff as assignee in bankruptcy of A. sued to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest. Defendant proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff gave in evidence the record of a judgment in his favor in an action in which he as assignee sued defendant to recover a payment of a debt made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment.

THE opinion states the case. Judgment for defendant below.

Geo. W. Parkhurst, for appellant.

W. H. Kenyon, for respondent.

FINCH, J. The plaintiff, as assignee in bankruptcy of George Ames, sued upon sixty-four causes of action, each of which alleged that the defendant had charged and received usurious rates

of interest on loans and discounts to Ames, and the firm of Ames & Tanner, whereby the bank became liable to refund double the amount under the act of Congress. These causes of action were met and answered by proof that they had been fully paid and satisfied, and the liability of the bank therefor released and discharged by the assignor before the commencement of the proceedings in bankruptcy. That proof was made by the production of a release under seal executed by said Ames, acknowledging full payment and satisfaction of all claims for excessive interest and releasing the bank therefrom. The contest thereafter turned upon the validity and effect of this release. The plaintiff attempted to render it ineffectual by bringing it within the condemnation of the Bankrupt Act. The only evidence he gave was the record of a previous judgment between the same parties in which the plaintiff sued as assignee to recover certain payments made to the defendant on the 31st day of March, 1877, being about a month earlier than the date of the release, as having been made when the debtor was in fact insolvent, and when the creditor had reasonable cause to believe in the existence of such insolvency, and knew that such payment was made in fraud of the provisions of the Bankrupt Act. These facts were decided in plaintiff's favor in that action, but they do not prove the plaintiff's case in this. To annul the release he was bound to show not only that at its date the defendant had reasonable cause to believe Ames insolvent, but that it knew that he executed it in fraud of the provisions of the Bankrupt Act (U. S. R. S., §§ 5128, 5129, as amended by Laws 1874, chap. 390, § 11; *Guernsey* v. *Miller*, 80 N. Y. 181). Proof that a payment made by the debtor to the creditor in March, 1877, was a fraudulent preference, known to be such, does not at all establish that payment by the bank to Ames in April, 1877, of a debt due the latter was either fraudulent or known to be such. The exception therefore to the refusal of the referee to find that at the date of the release the defendant had reasonable cause to believe Ames insolvent was not well taken. The fact was immaterial, unless further proof was given showing knowledge of a fraud upon the Bankrupt Act. No such proof was given. The plaintiff seeks to supply it by calling it a transaction not in the usual and ordinary course of business of the

debtor, and invoking the presumption arising from that fact. U. S. R. S., § 5130. But Ames simply collected a debt due him and settled an obligation which he held against the bank. That did not become a matter outside of his usual and ordinary business because the character of the debt was unusual and peculiar. It was collecting back an over-payment. His loans and discounts, his payments of interest were usual and ordinary, and his settlement of a demand for payment in excess cannot be deemed outside of the usual and ordinary course of business. The further argument that the release was against public policy does not need discussion. We think the defense was complete and properly allowed to prevail.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW YORK v. MECHANICS' NATIONAL BANK OF NEWARK, N. J.

CORN EXCHANGE BANK v. SAME.

WEST SIDE BANK v. SAME.

(89 N. Y. 467.)

Attachment.

An attachment from a State court may not issue against an insolvent National bank of that State.

MOTIONS to correct remittiturs. The opinion shows the case.

George C. Lay, Jr., for motion.

Aaron Pennington Whitehead, opposed.

DANFORTH, J. The appellants ask to have the remittitur in these several cases recalled, in order that application may be made

for such amendment to the orders appealed from, as will show that they were made upon the ground that the justice of the Supreme Court who granted the attachments had no power or jurisdiction in the premises. If this fact appeared, it would present a case for our consideration (*Allen* v. *Meyer*, 73 N. Y. 1; *Dunlop* v. *Patterson Fire Ins. Co.*, 74 id. 145; 30 Am. Rep. 283), and if likely to be disposed of in a manner favorable to the appellants, we should grant the application.

But upon the hearing of the appeal, the point which upon such amendment would be before us was fully presented by counsel for the appellants, and answered to by the respondents. It was ably argued by both, and although we were constrained, in accordance with long-settled practice in such cases, to dismiss the appeals, the question was considered by us, and the conclusion reached that the attachment was improvidently issued. In the recent case of *Robinson* v. *Nat. Bk. of Newberne*, 81 N. Y. 385; 37 Am. Rep. 508; 2 Nat. Bank Cas. 309, the same general question was before us for judgment. In that case an attachment had been issued against the property of a solvent National banking association, and we thought it should be upheld upon the ground that the prohibition against such process contained in section 5242 of the United States Revised Statutes applied only to an insolvent corporation, or one about to become so. It is apparent from the papers in the case now here that the defendants in the attachment proceedings are in that condition, and we find no reason for doubting that they are within the prohibition and intent of the statute (*supra*).

"No attachment," it says, "shall be issued against any such association, or its property, before final judgment in any suit, action or proceeding in any State * * * court."

As a corporation can act only in the mode and within the limitations prescribed by the law creating it, the same law may impose upon parties dealing with the corporation such restrictions as the enacting power deems proper, in preserving, applying or subjecting its assets to the discharge of its obligations, and may, among other things, provide that any one or more of the usual remedies of creditors against a debtor shall in certain cases be withheld.

The laws of this State not only render invalid any transfer of property, or payment made, but any judgment confessed or lien

created by a moneyed corporation when insolvent, or in contemplation of insolvency, with intent of giving any preference to any creditor. Title 2, part 1, chap. 18, art. 1, § 9, 1 R. S. 591. The object and spirit of this act undoubtedly is, to secure an equal distribution of the effects of a moneyed corporation among its creditors, in case of insolvency. Its validity has not been doubted. We have given this construction to the statute of the United States containing the prohibition above cited (*Robinson* v. *Nat. Bank of Newberne, supra*), and so it is directly held in *National Bank* v. *Colby*, 21 Wall. 609; 1 Nat. Bank Cas. 109.

If the orders were amended in the manner indicated, these views would lead to their affirmance, and it therefore would not benefit the appellants to grant their motion.

The motion should be denied, with costs.

All concur.

Motion denied.

Talmage v. Third National Bank of the City of New York.*

(91 N. Y. 531.)

Agency — broker — implied authority to pledge stocks — tender. Place of trial.

Moller & Co., brokers and agents for Hunt, by an absolute power of attorney, having authority from her to pledge her stocks for a loan of $35,000, contracted with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for Hunt, and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. *Held*, that defendant could not hold the same as security for other loans made by it to M. & Co.

Plaintiff tendered before suit the $35,000 and interest, and on this being refused, tendered $46,000. *Held*, not a conclusive admission that defendant had a lien for the latter sum.

A National bank may be sued in the county where the plaintiff resides.

APPEAL from judgment for plaintiff, and appeal from order denying a motion to change the place of trial from the county of Kings to the county of New York.

* Reported below, 27 Hun, 61.

Action for conversion of stocks. The facts are stated in the opinion.

S. P. Nash, for appellant.

William N. Dykman, for respondent.

MILLER, J. The stocks to recover the value of which this action was brought were originally pledged as collateral security for a loan made by the defendant to Moller & Co., for the benefit of Julia G. Hunt, the plaintiff's assignor. They were afterward used to secure moneys loaned to Moller & Co., on their own account by the bank. Moller & Co. were the brokers and agents for Mrs. Hunt, and the question to be determined is, whether the defendant, the bank, had knowledge that they were loaning to Mrs. Hunt and receiving her stocks in pledge for the sum of $35,000 only, and that Moller & Co. were her agents and not the owners of the stocks. *Merchants' Bank* v. *Livingston*, 74 N. Y. 223; *McNeil* v. *Tenth Nat. Bank*, 46 id. 325; 7 Am. Rep. 341. This question was one of fact which was left to the consideration of the jury, under the charge of the court, and the jury found in favor of the plaintiff. It appears that the stocks were delivered to Moller & Co., as agents of Mrs. Hunt, with authority to use the same for the purpose of procuring the loan first made thereon, and unless the defendant was advised as to the character and extent of the agency, it should not be held liable. Certain stocks had been purchased by Moller & Co. for Mrs. Hunt, and they gave their notes with the stocks as collateral, and received the money to pay for the stocks so purchased. There was proof to show that Moller went to the president of the bank and made the loan of $35,000 with him, stipulating at the time that it was Mrs. Hunt's stock, and that it was desired to give sufficient margin so that there would be no inconvenience, as she was about going abroad, and also stipulating that the loan should not be disturbed. Although this testimony was contradicted, the jury found a verdict for the plaintiff, which must be regarded as conclusive as to the notice to and knowledge of the defendant, unless there is some valid and legal ground for disregarding the same. The appellant's counsel claims that the de-

fendant had no knowledge of the limitation by Mrs. Hunt to her agent to borrow only $35,000; that Moller & Co. were authorized to carry and take care of the stocks, and that she conferred authority upon them, and they had a right, as general agents, to sell the stocks or to borrow money upon them. We think this position cannot be sustained. If they had knowledge, as is established, if the fact that the loan was to be made for the specific amount of $35,000, and for a special purpose, as was proved, the inference is the loan was made and the stocks were to be used for that purpose alone; the defendant had no right to assume that Moller & Co. had any authority to make other loans with any other object in view, certainly not without some explanation or statement that the subsequent loans were made for the benefit of Mrs. Hunt. It is not claimed that such was the case. Acting under the original agreement as to the loan there is no ground whatever for claiming that any subsequent loan was in pursuance thereof. It is true that it is said in *Merchants' Bank* v. *Livingston*, 74 N. Y. 223, the broker "had no authority to make the loan at all," but although such may be the case, we are unable to see how this can make any difference where the authority is limited, and the limitations made known to the lender, as was the case here. Upon no sound principle can it be maintained that the lending of a specific amount of money, on collaterals, to a broker or agent under special arrangements, confers authority upon the agent or broker to make future loans which have no relation to such arrangements and no connection with the original loan. Even if it be conceded that Mrs. Hunt intrusted Moller & Co. with the securities and authorized them to make the loan in their name and upon their own obligation, and sanctioned the terms of such obligation as they might execute, inasmuch as the bank understood, as the verdict of the jury indicated, the amount of the loan which was to be made upon the securities offered, that it was for a specific purpose, and that no more than that amount was to be required on the securities, there is no ground for claiming that the stocks were subject to the general banker's lien for all moneys borrowed by the brokers from the bank. The arrangement made, and the circumstances attending it, which were

known to the bank, precluded it from claiming any right to such a lien. It cannot fairly be claimed that Mrs. Hunt received the money loaned upon any such terms or with any knowledge or understanding that the securities pledged were subject to any lien of the bank for any other moneys loaned to her broker. She conferred no authority upon her agents for this purpose; she had no knowledge of any such lien beyond $35,000, and as the bank understood the arrangement that that amount only was to be loaned on the securities, there is no valid ground upon which she should be held liable. The question whether the bank was entitled to a general lien depended upon the fact whether it had notice that Mrs. Hunt was the owner of the stocks and that they were pledged as collateral only for the loan of $35,000. This was a question for the jury to determine upon all the evidence in the case, and therefore the motion to dismiss the complaint upon this ground was properly denied. Plaintiff before suit brought on demanding securities tendered $35,000 and interest, and, this being refused, tendered $46,000, which was also refused.

The request to charge that the tender of $46,000 was an admission that that amount and interest was a proper claim of the bank upon the stocks was properly refused. We think that the tender was not conclusive upon the plaintiff as admitting that the defendant had a lien upon the stocks for that amount. It was made with a view of arranging the controversy without litigation, and the principle is well established that concessions made for the purpose of securing a settlement of the controversy cannot operate to the prejudice of the party making them. Where a tender is made, for the purpose of obtaining property of the owner, sold and in the hands of the tenderee claiming to own the same, and accepted, the money paid may be recovered back. *Briggs* v. *Boyd*, 56 N. Y. 289; *Scholey* v. *Mumford*, 60 id. 498. Upon this principle the tender made may be regarded the same as if the money had actually been paid, and cannot be available as a defense to the plaintiff's action. Such a tender is not an estoppel, and the case of *Eaton* v. *Wells*, 82 N. Y. 576, has, we think, no application. For the reasons last stated the request to charge, that the $46,000 and interest should be deducted from the value of the stocks, was also properly refused.

We think it very clear that if the bank had knowledge at the time they made the loan of $35,000 that the brokers were acting as agents for Mrs. Hunt, and that Moller had no authority as agent for Mrs. Hunt except to make the loan for that amount, the power of attorney given to the brokers, although absolute on its face, did not authorize a loan beyond the $35,000.

The judgment should be affirmed.

The record in this case also brings up for review an appeal from an order of the General Term, affirming an order of the Special Term, denying a motion to change the place of trial. It appears from the motion-papers that the plaintiff in this action resides in the county of Kings and the defendant is located in the city and county of New York; the place of trial named in the complaint is the county of Kings, and the question presented upon this appeal is, whether a National bank can be sued in the Supreme Court of this State out of the county where it is located. This question involves the construction to be placed upon various provisions of the United States Revised Statutes. By section 5136, subdivision 4, it is declared that a duly organized National bank shall have power:

"To sue and be sued, complain and defend in any court of law and equity as fully as natural persons."

By section 5198 as originally enacted, it was provided:

"The taking * * * a rate of interest greater than is allowed * * * shall be deemed a forfeiture of the entire interest * * *. In case the greater rate of interest has been paid, the person by whom it has been paid * * * may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

This section was amended in 1875 by adding as follows

"That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial courts of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Section 5198, *supra*, as it was before this amendment, related to actions for forfeitures and penalties for taking a greater rate of interest than is allowed by law to National banks, and there is some grounnd for claiming that this amendment was to be lim-

ited and confined to cases where actions were brought against National banks for penalties under the law cited. Such a construction would be consistent with the provisions of section 5136, which relates to suits brought by and against National banks. The amendment was without doubt intended to give jurisdiction to State courts, in suits for usury penalties, which previously did not exist, and was confined to the courts of the United States. See U. S. R. S., § 711, subd. 2. It will be noticed that the amendment in question uses the word "may," thus indicating that it was not intended to be imperative or compulsory, or in any way inconsistent with the provisions of section 5136, which declares that these banks may "sue and be sued, complain and defend in any court of law or equity as fully as natural persons." It is true that in the construction of statutes the word "may" is sometimes construed as meaning "must," in order to carry out the intention of the framers and the object of the law. But such a construction in this case might lead to great practical inconvenience and would be evidently inconsistent with the object of the provision in question; it would confer special rights and privileges on these institutions and compel parties who had claims against them to bring suits in the location where they were situated and subject them to great expense and unnecessary trouble. This might act as a very great hardship in cases where actions might be brought in favor of one of these institutions, located at a distance from the other sued. This could never have been intended, and the evident purpose of the amendment was to give authority to sue these institutions in the State court, if it did not previously exist under section 5136.

We think it is also a legitimate construction of the provision of the act that the words restricting the bringing of suits were confined to local courts, such as county courts and municipal courts, and not to the Supreme Court of the State, and that a party living in a county at a distance from a National bank has a right to bring an action in his own county against it for any lawful claim, subject to an application to change the place of trial for the convenience of witnesses in accordance with the practice of the court. The rule contended for by the appellant's counsel, that "if an affirmative statute which is introductive of a new law

directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner," has no application to the case presented by the appeal-book, and to the statute intended to regulate the proceedings of courts in reference to suits which it might be necessary to institute against corporations. It must be borne in mind that the statute in question was for the benefit of parties in the prosecution of their rights against banking institutions in the courts of the State where they were located, and was not an imperative provision for the purpose of restricting or limiting such right. The case of *Hagadorn* v. *Raux*, 72 N. Y. 586, is not in point, and the rule there laid down relates to the statute pertaining to public officers, which imposes duties upon them, which they have failed to perform, and is not applicable to this case. The case of *Casey* v. *Adams*, 102 U. S. 66; 2 Nat. Bank Cas. 102, cited by the appellant's counsel, does not aid him. The question there was a local question and the plea was to the jurisdiction. The effect of the statute on transitory actions was not expounded. It is, we think, adverse to the position of the appellant's counsel. The decisions of the courts of this State are in conformity to the views we have expressed, and language in statutes of a similar character is held to be permissive only. *Cooke* v. *State Nat. Bk.*, 52 N. Y. 109; 11 Am. Rep. 667; 1 Nat. Bank Cas. 698; *Robinson* v. *Nat. Bk. of Newberne*, 81 N. Y. 387; 37 Am. Rep. 508; 2 Nat. Bank Cas. 309.

For the reasons stated the order should be affirmed.

All concur.

Judgment and order affirmed.

Second National Bank of Oswego v. Burt.

(93 N. Y. 233.)

Cashier — negligence in discounts — limitation of loans to single person or firm. Damages — profits of speculation.

The by-laws of plaintiff, a National bank, directed that there should be "a standing committee known as the exchange committee, consisting of the pres-

ident, cashier and one director," having power to discount bills, etc., who were required to report at each meeting of the board of directors. The cashier was empowered, with the assent of the president, to "make discounts of an ordinary character." When the committee was not in session, such discounts were to be reported at its next meeting. No such committee was ever appointed. A discount committee of directors was appointed by the board, also an advisory and executive committee, but neither ever held a meeting. In January, 1873, plaintiff's president announced to the board of directors that he could not thereafter actively perform the duties of his office, and requested the appointment of a committee to examine, from time to time, its financial condition. Such a committee was appointed, with directions to investigate "three or four times each year." Thereafter the president took no active part in the business. Defendant, plaintiff's cashier, with the knowledge and at least tacit consent of the president and directors, discounted certain drafts, the drawers and drawees of which, at the time of the discounts, possessed the highest degree of commercial credit, but before the maturity of the paper became insolvent. *Held*, that in the absence of any claim of want of integrity, judgment or skill on his part, he was not liable.

By another of plaintiff's by-laws, the names of two responsible persons were required upon discounted paper, the name of a firm being considered as one person. The drafts in question were drawn by the firm of P. & Co. upon W. & Co., both being composed of the same members. The business of the two firms was separate and distinct. The former bought and manufactured lumber, at Oswego, shipping it to W. & Co., at Albany, for sale. The latter firm was also consignee for other parties, selling on commission. *Held*, that defendant was not liable for loss by approving such paper for discount.

The drafts in question came within the exemption in the National Banking Act (§ 29), of *bona fide* bills of exchange, drawn upon actually existing values, from the prohibition against loans by National banks to a single person or firm, in excess of one-tenth of its capital.

It could not be assumed that W. & Co. were not, at the time the drafts were discounted, in receipt of property from P. & Co., sufficient to meet their requirements.

Defendant, contrary to a resolution of plaintiff's board of directors, discounted his own notes, using the proceeds in the purchase of wheat on speculation. When the transaction came to the knowledge of the directors they immediately removed defendant from his office. Defendant thereafter deposited with plaintiff a sum sufficient to pay said notes, declaring at the time to the officers of the bank that the deposit was for that purpose. They accepted the money, but refused to deliver up the notes or to return the money. The wheat was sold, after the commencement of this action, for a profit. *Held*, that plaintiff was not entitled to the profits.

APPEAL from judgment entered upon an order, which modified, and affirmed as modified, a judgment in favor of plaintiff.

Action against a former cashier of the plaintiff, for damages for negligence and violation of duty, and to compel him to allow for and pay over profits made by him, by the unlawful use of plaintiff's funds.

The facts are stated in the opinion.

William F. Cogswell, for appellant.

Albertus Perry, for respondent.

RUGER, C. J. The principal question arising upon this appeal is over the alleged liability of the defendant for a neglect of duty as cashier of the plaintiff in discounting certain drafts drawn by Page & Co. of Oswego, upon White & Co. of Albany, in the months of April and May, 1873, and which were accepted by the drawees. These drafts were lost to the plaintiff on account of the insolvency of Page & Co. and White & Co., whose failure occurred on the 20th of May thereafter. The proceeds, when discounted, were placed to the credit of Page & Co., and the amount of such paper remaining unpaid when the insolvency of the parties accrued was $24,000. It is to be observed in the outset that no question is made as to any want of integrity, judgment or skill on the part of the cashier in the transaction of the business in question, but he is sought to be held liable solely for his alleged neglect to observe a regulation of the bank. The firms of Page & Co. and White & Co., who were respectively the drawers and drawees of the paper discounted, possessed the highest degree of commercial credit at the time of the discount; and some of the individuals composing these firms were known to have large private fortunes. These discounts were all made with the knowledge, and at least tacit consent of the president and directors of the bank, and were considered in financial circles as desirable business for a bank to secure. Various regulations of the plaintiff, contained in the articles of association, by-laws and proceedings of the board of directors, were put in evidence as bearing upon the duty of the cashier of the plaintiff in discounting paper offered for that purpose at the bank. Those which are material to the present inquiry are as follows. By-laws:

"SEC. 15. The bank shall be open for discount and deposit, and for the payment of notes, drafts and other papers held by the bank, from 10 o'clock, A. M., to 3 o'clock, P. M., each day of the year excepting Sundays and days recognized by the laws of the State as National and religious holidays. There shall be a standing committee, to be known as the exchange committee, consisting of the president, cashier and one director, appointed by the board every six months, to continue to act until succeeded, who shall have power to discount bills, notes and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the board make a report of the bills and notes purchased by them since their last report. The president, or cashier, with the assent of the president, shall also have the right to make discounts of an ordinary character, as to amount and kind of security, when the committee is not in session, reporting the same to the committee at their next meeting thereafter, and laying the paper so discounted before them.

"SEC. 19. Persons applying for discount shall, in all cases, indorse or guarantee the paper offered. No note shall be discounted for a less amount than $50, and to entitle any paper to be discounted, there must be two names of responsible persons liable upon the same, or satisfactory collateral security given, the name of a firm being considered one person. The names of the individual members of the firm who are parties to discounted paper shall be ascertained and a memorandum made thereon; and the cashier shall take care that the name of a firm shall not be received as security without clear evidence that all of the members assent thereto."

It does not appear that an exchange committee was ever appointed under the above by-laws. On the 10th day of January, 1871, it does however appear from the record of the proceedings of the directors that "I. L. Jenkins and Gilbert Mallison were then appointed a discount committee for the year." It does not appear that any other discount committee was ever appointed, or that these persons ever held a meeting or acted in that capacity. It also appears by the proceedings of the directors for the 9th day of January, 1872, that "G. B. Johnson, E. P. Burt and Geo. G. French were appointed advisory and executive committee." It nowhere appears what the duty of this committee was, or that they ever held any meeting, or performed any duty in regard to the discount of paper offered at the bank.

On the 23d day of January, 1872, the board passed the following resolution:

"*Resolved*, that no officer of this bank shall have power to make any loan or discount without the written consent of the advisory or executive committee, the president and Benjamin Doolittle, or any two of them."

This resolution was, on the 25th day of May, 1872, rescinded by the board. At a meeting of the board held on the 18th day of January, 1873, the president, Mr. Ames, announced "that he could not give as much attention to this bank as formerly, and should take no further compensation for his services, but in place thereof asked that a committee of three be appointed, at a compensation of $10 per day each and expenses, whose duty it should be to examine at such times as they deemed best the financial condition of this bank. Thereupon Messrs. Mallison, Jenkins and French were appointed such a committee at said compensation to investigate the same three or four times each year."

The several drafts of Page & Co., out of which this alleged cause of action arose, were discounted between the 5th day of April and 15th day of May, 1873, after the appointment of this committee, but the practice of discounting this paper had been going on for several months previous to that time. The undisputed evidence in the case shows that these several by-laws were from the first uniformly disregarded in the practical management of this bank with the knowledge and acquiescence of its officers. Such laws were equally as obligatory upon the president and various committees therein referred to as upon the cashier, and impliedly required them either to attend at the bank at stated periods to perform the duties enjoined upon them, or at least to keep themselves accessible to the cashier and in a position to be conveniently consulted by him according to the requirements of the business. To impose upon the cashier the duty of carrying on the business of a bank and yet hold him responsible for a neglect of duty in not consulting officers and committees who apparently held no meetings and systematically absented themselves from the performance of their duties is an imposition which the law will not tolerate. It would be quite impracticable for the managing officer of a bank required to keep it open daily to leave his place of business as each transaction requiring attention occurred to look up persons engaged in other employments and consult them in regard to such transactions.

The reasonable construction to be given to the resolution of the 18th of January appointing a committee to occasionally investigate the affairs of the bank, taken in connection with the with-

drawal of the president from the active performance of his duties, and the practical interpretation thereof by the committee would lead to the conclusion that the restrictions theretofore existing upon the power of the cashier to discount paper were intended to be practically abrogated. At the time of this meeting, if any such resolution then existed, it was simply a requirement that he should consult the president in regard to discounts. When therefore Mr. Ames announced his practical withdrawal from the performance of his duties as president, and a committee was appointed in his place whose duties were defined to be to investigate the affairs of the bank three or four times each year, it could not have been in the contemplation of any one that he intended to perform the daily and hourly duty of supervising the paper offered for discount at the counter of this bank or that the committee appointed in his place was to perform any other duty than that stated in the resolution appointing them.

The resolution must be construed in the light of existing circumstances and the known habitual practice of the cashier to discount business paper as it was offered, subject to the oversight of the president and the executive committee at such times as they saw fit to exercise their power of supervision. But it is unnecessary to enlarge upon these considerations, inasmuch as, not only the judgment of the court below, but also the argument of the respondent's counsel, place the liability of the defendant mainly, if not altogether, upon other grounds. The recovery in this case is attempted to be supported upon an alleged violation of by-law No. 19, in not requiring the names of two responsible persons upon discounted paper, the name of a firm being considered as one person; and also his alleged violation of section 29 of the National Banking Act in allowing the firm of Page & Co. to borrow money from the bank to an amount in excess of one-tenth part of its capital stock upon paper other than discounts of bills of exchange drawn upon actually existing values, or business and commercial paper.

The referee held that both of these provisions were violated by the defendant, and ordered judgment against him for the whole sum of Page & Co.'s paper remaining unpaid, less a dividend of two per cent anticipated from their assets in bankruptcy.

The General Term however modified this judgment, holding that the name of E. E. Jubert appearing upon $13,000 of the paper in question, in addition to the names of Page & Co. and White & Co., satisfied the provision of the by-law requiring the names of two responsible persons or firms upon such paper, but they also held that the paper in question not being bills of exchange, drawn upon existing values, or business or commercial paper within the meaning of the National Currency Act, was the discount thereof by the defendant in excess of one-tenth part of its capital stock, viz.: $12,000, and was therefore a violation of said act which rendered the defendant liable for such excess.

We are constrained to differ both with the referee and also with the General Term, not only as to the true construction of the by-law requiring the names of two persons or firms upon discounted paper, but also as to the commercial character of the paper in question. The proper consideration of these questions requires a brief reference to the evidence showing the nature and character of the business carried on by the various parties to this paper, and also to the methods employed by them in transacting such business.

The respective firms of Page & Co. and White & Co. were composed of the same individuals, viz.: A. S. Page, S. W. Barnard and D. L. White, engaged in the business of buying, selling, shipping and manufacturing lumber, at Oswego, under the firm name of Page & Co., and at Albany, as White & Co. The same individuals, and one William Jones, were also associated together as members of a firm doing business in Canada as manufacturers of lumber under the firm name of A. S. Page & Co. The general market for all of the lumber dealt in by these parties was at Albany, and White & Co. were not only the general consignees of the various firms, but also of third parties who forwarded lumber on commission to them for sale in the eastern market. In the language of the only witness showing the course of the business pursued by these firms it appeared that "so far as doing business was concerned Page & Co. and White & Co. were conducted as if they were two separate firms, and strangers; so of keeping their books." "Lumber came forward here (at Oswego) whether purchased, manufactured or consigned on commission. We paid

the advances and charges, and made drafts on the consignees for the amount of their charges." It is obvious from the method thus described that each of these firms was in the constant practice of contracting debts, acquiring property and entering into engagements under their respective firm names, which property they would each hold, and which obligations they would each owe irrespective of the other firms for many purposes.

It is quite evident that the firm of White & Co. as the general consignees of the lumber sent forward for market would ultimately be the recipients of the great bulk of such property, and come into possession of the proceeds of its sales. The firm of A. S. Page & Co. and Page & Co., on the other hand, would appear from the course of business to be those who would primarily become liable for the cost and expense of buying and manufacturing the lumber, and fitting and forwarding it to market, and the financial inequality which would necessarily and constantly result from this course of business could be corrected only by drafts drawn by the consignors upon and payable by the consignees, or the remittance of funds effected in some other manner. We think therefore that the drafts in question came within the meaning of that clause of the National Currency Act providing that *bona fide* bills of exchange drawn upon actual existing values should not be subject to the prohibition against banks lending money to a single person or firm in excess of one-tenth part of their capital.

We think it entirely immaterial whether such bills are accompanied by a specific bill of lading in each case, or are drawn against property previously consigned, and existing either in its original form or in the shape of proceeds of sales in the hands of the consignees. In either case the funds have already been provided by the drawer in the hands of the drawees to meet the requirements of the obligation.

The object of this provision of the Currency Act was to guard National banks from the hazard of loaning money in improvident amounts upon speculative and accommodation paper, but it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country.

We are required to assume, in support of the judgment in this case against the probabilities and without any evidence to sustain it, that White & Co. were not at the time these drafts were discounted in the receipt of property from Page & Co. sufficient to meet their requirements. There is not only an absence of any finding by the referee to sustain this assumption, but such a finding, if made, would have been entirely unsupported by the evidence.

We are therefore of the opinion that the court below erred in holding the defendant liable for discounting the paper in question to the amount in excess of the tenth part of the capital stock of the plaintiff, and that such discount comes within the exception as being *bona fide* bills of exchange drawn upon existing values.

Neither do we think that the defendant could justly be held liable under the circumstances of this case in consequence of the provision of the by-law requiring the names of two responsible persons or firms upon discounted paper. Even if he knew that the firms of Page & Co. and White & Co. were composed of the same individuals, he was justified in supposing that they constituted two firms within the meaning of the by-law. No question arises in this connection as to the mutual rights and liabilities of these several firms as among themselves or to their respective individual members.

The sole question is as to the relation they bear to third persons dealing with them.

It is a general rule, not only in equity but at law, that property held and owned by separate firms is primarily chargeable with the payment of the debts of the firm holding the property, and it is only after those debts are wholly satisfied that collateral rights in such property can be regarded. *Wilson* v. *Robertson*, 21 N. Y. 592; *Menagh* v. *Whitwell*, 52 id. 147; 11 Am. Rep. 683.

So far as the liability of such firms is concerned they each constitute legal entities, assuming and performing their respective obligations, and each holding exclusive funds to effect the objects of its association. Pars. Part. 346; *In re Nims*, 16 Blatchf. 439; *Forsyth* v. *Woods*, 11 Wall. 484. The legal title to the

property acquired by either of these firms would vest in the partnership under their respective firm names, and remains liable to the satisfaction of the firm obligations until disposed of in the regular course of partnership business.

Debts contracted by the individuals composing the partnership, either individually or jointly, in any other way than under the firm name, are not entitled to share in the final distribution of the partnership assets until after the discharge of all the partnership obligations. *Turner* v. *Jaycox*, 40 N. Y. 470; *Menagh* v. *Whitwell*, *supra*. It necessarily follows that obligations incurred by the firm of Page & Co. were not entitled to be enforced against the property held under the name of White & Co. until all of the partnership debts of White & Co. had been satisfied.

It is not supposed to create any difference whether these several firms are composed wholly of the same persons or partly of the same persons and others associated with them. The principle upon which the rule rests applies equally to either case. *In re Nims* and *Forsyth* v. *Woods*, *supra*.

It is based upon the equities of the creditors in the property of the firm to whom they have given credit. The property of the creditor has been used to swell the assets of the firm, and he thereby becomes equitably entitled to a preference over individual creditors in the payment of his debt from such assets. The credit was presumably given in reliance upon the responsibility of the firm induced by its possession and apparent ownership of its property. *Menagh* v. *Whitwell*, *supra*; 2 Kent Com. 64. Therefore when the plaintiff obtained the name of White & Co. upon the paper drawn by Page & Co. they had secured the means of reaching a fund for the payment of their debt, which was previously contingently liable only, and had thereby accomplished the object and intent of the by-law in question.

Neither do we think that the obligation laid upon the cashier by this by-law required him, in all cases where paper was offered for discount at the bank, bearing the name of a firm remote from his place of business, to refuse to enter into a profitable transaction in the usual and ordinary course of business for his principal, or attempt to delay it until he could obtain information from distant points as to the individual names of such firm. Such a course

of business would be utterly impracticable, and could not have been within the contemplation of the framers of this by-law. They evidently intended only the investigation of the individual names of the members of firms residing in its vicinity and offering paper for discount. The law should be construed according to the intent of its framers, and not as a trap to catch innocent parties. The uniform acquiescence of the officers and committees of this bank in the course of business pursued by the defendant as cashier in discounting Page & Co.'s paper, and their long delay in making any claim for damages on account of the pretended violation of this by-law, afford the strongest evidence of their approval of the practical construction given to it by the defendant.

It follows from these views that there should have been no recovery against the defendant on account of the transactions relating to the discount of the paper of Page & Co.

The defendant was also held liable for the profits arising out of a certain transaction in the purchase of wheat, in which he engaged in the fall of 1873, with what was claimed to be the funds of the plaintiff.

The material facts out of which this claim arose are briefly as follows:

In November, 1873, the defendant conceived the idea of speculating in wheat, and engaged with the firm of Ames, Hastings & Co. to jointly purchase a cargo of wheat in Milwaukee, and hold it for the anticipated rise in its value. To raise the necessary funds to accomplish this purpose, he executed his individual promissory notes, payable on demand for the necessary amount, and caused them to be discounted at the plaintiff's bank, and used the funds so obtained in the purchase of the wheat. The act of the defendant in discounting this paper was contrary to the provisions of a resolution of the board of directors of the plaintiff, in force at the time of such discount. When the transaction was discovered by the directors of the bank this wheat lay in store at Oswego undisposed of. The knowledge of this transaction came to the directors on the 23d day of December, 1873. They immediately caused the defendant to be removed from his position as cashier, upon the ground that he had violated the resolution of the board of directors by causing his own paper to be discounted at the bank without the consent or approval of other officers.

On the 10th day of January, 1874, the defendant deposited with the plaintiff a sum more than sufficient to pay the amount of said discounted notes, for the purpose of paying such notes, as was declared by him to the officers of the bank at the time of making the deposit.

The officers received the deposit and after acquiring it refused to deliver up such notes. After demand duly made they also refused to return such moneys, or any part thereof, to the defendant.

At the time of this transaction the speculation in the wheat was still in embryo and might have terminated in a loss. None of the wheat was sold by the defendant until after the commencement of this action.

We agree with the referee in his opinion that "the money used by the defendant in the purchase of said wheat was the plaintiff's money, and they are legally entitled to follow the same into its product, the wheat, and take same and its fruits and products as its own."

"It is doubtless true that the *cestui que trust* has an election to affirm or disaffirm the pretended contract."

The cashier of a bank occupies such a situation with reference to the funds within his control as an officer of the bank that he cannot lawfully use such funds in private speculation to his own profit without the consent of those legally authorized to represent the bank.

In this case the defendant unlawfully took possession of the funds of his principal and was bound, at the option of his principal, either to return the funds unlawfully taken or surrender the property in which they had been invested. The election, which the plaintiff had at this time, was between the disaffirmance of the act of the defendant in borrowing its money and an assertion of the right of acquiring possession of the property bought with such funds, or the reception of the re-payment of the loan by its agent.

It could not receive its funds and also reclaim the wheat. It had the right to do either one or the other, and its election to pursue one necessarily constituted a rejection of the other alternative.

The only demand appearing from the evidence to have been made upon the defendant in respect to this transaction was made in the latter part of January, 1873, by one of plaintiffs' directors, and was a peremptory demand for the payment of "$5,000, profits on wheat."

No profits had at that time been realized on the transaction, and it was altogether a matter of speculation whether it resulted in a profit or loss. The same demand was much larger even than the amount eventually realized from the transaction.

The plaintiff never offered to assume the risk of the transaction or requested an immediate sale of the wheat and a determination of the result of the adventure. It simply attempted to secure the benefits of the transaction without offering to incur any risk.

No such right of election accrued as entitled it to take the profits of the adventure, if any were made, and at the same time to repudiate its possible losses. The transaction was single and entire, it was bound to affirm or disaffirm it, as it then existed in its entirety with the hazards attending it. *F. L. & Trust Co.* v. *Walworth*, 1 N. Y. 433; *N. Y. & N. H. R. Co.* v. *Schuyler* 34 id. 30. The relations existing between a banking corporation and its cashier are more analogous to those attending the relation of principal and agent than those of sureties and *cestui que trust*, and the principles governing the right of disaffirming unauthorized acts should be those which obtain as between principal and agent. In the case of adult parties subject to no legal disabilities the adoption or repudiation of a transaction involving the unauthorized use of their funds must be promptly made, upon discovery of the facts, and when once deliberately made is finally made. *Boerum* v. *Schenck*, 41 N. Y. 182. The plaintiff in this case had no right to impose upon the defendant the risk attending the final result of the venture, and still claim to hold an interest in it. When it accepted the return of the funds illegally invested by its agent with knowledge of all of the facts it ceased to have any interest in the transaction.

After that time it was carried on, and was consummated exclusively with the money of the defendant and not with trust funds, and he necessarily became entitled to the advantages of

the speculation, if any, which resulted from the continuation of the adventure.

We therefore think the referee erred in charging the defendant with the amount of the profits finally realized from the speculation in wheat.

We have examined the exceptions taken to the allowance made by the referee of the various other items of charges against the defendant and are satisfied that they were properly allowed.

It follows that the judgment should be reversed and a new trial ordered before another referee unless the plaintiff stipulates to reduce the judgment rendered on the report of the referee for damages to $379.62, in which case the judgment should be affirmed. The appellant should have costs of this appeal.

All concur.

Judgment accordingly.

Simons v. First National Bank of Union Springs.

(98 N. Y. 269.)

Mortgage — to secure future debts — evidence — power of National bank to take.

A mortgage recited that it was "intended as collateral security for the payment of any indebtedness" of the mortgagors to the mortgagees, and provided that when the mortgagors "shall have paid all such indebtedness this mortgage shall become null and void." No indebtedness existed when it was executed, but one was subsequently incurred to about the sum specified in the mortgage. In an action by junior mortgagees to have their mortgage declared the first lien, *held*, that the real intention of the parties might be shown *aliunde;* and it appearing by such evidence that the mortgage was intended as a continuing security for future indebtedness, the action was not maintainable.

A National bank may lawfully take a mortgage to secure future indebtedness.

ACTION to set aside a sale on foreclosure by advertisement of a mortgage executed by defendants Shank & Shoemaker to defendant the First National Bank of Union Springs, to have a mortgage owned by plaintiffs, covering the same premises, adjudged to be the prior lien, and for a foreclosure thereof. The facts are stated in the opinion. Judgment for defendant.

H. V. Howland, for appellants.

W. E. Hughitt, for respondents.

ANDREWS, J. The mortgage of the First National Bank of Union Springs was prior in date to the plaintiffs' mortgage and was first recorded. It was regularly foreclosed by advertisement under the statute, and the premises were purchased on the sale by the defendant Schenck, who subsequently conveyed them to the defendant Kyle. The only ground upon which the plaintiffs rely to sustain the claim to set aside the sale and to have their mortgage declared the first lien upon the premises is, that there was no existing indebtedness from Shank & Shoemaker to the Bank of Union Springs when the mortgage to the bank was executed, and that only indebtedness existing at that time is within the condition of the mortgage. It is not open to question that it was the intention of the parties to the mortgage that it should be a continuing security for any indebtedness which might be incurred by the mortgagors to the bank after the mortgage was executed. The court found upon the request of the plaintiffs that the mortgage was executed solely to secure any future indebtedness which might accrue from the mortgagors to the bank, and the plaintiffs cannot now controvert this finding.

If therefore the condition of the mortgage can be construed as covering indebtedness of the mortgagors to the bank, which might be contracted subsequent to its execution, the action must fail. No fraud is found or proved, and it is undisputed that there was a debt nearly or quite equal to the whole nominal consideration of the mortgage at the time of the foreclosure. The mortgage recites a consideration of $5,000, and the condition is as follows: "This grant is intended as collateral security for the payment of any indebtedness of the said first parties to the said party of the second part, by note or otherwise; and whenever the said first party shall have paid all such indebtedness, this mortgage shall become null and void; which said sums, principal and interest, the said parties of the first part hereby covenant and agree to pay to the party of the second part, in the manner and at the time or times aforesaid, and this conveyance shall be void

if such payment be made as herein specified." It will be observed that there are no express words confining the security to debts existing when the mortgage was made. The words are "any indebtedness." The language may refer as well to contemplated as to existing debts, and the real intention of the parties may be shown *aliunde* without infringing the rule which excludes parol evidence to extend or change the meaning of written instruments. *Truscott* v. *King*, 6 N. Y. 147.

The plaintiffs' mortgage was given to secure an antecedent debt. When taken the mortgage to the bank was on record. The plaintiffs could by actual notice have prevented subsequent advances by the bank on the credit of its mortgage to the plaintiffs' prejudice. In this case the evidence tends to show that the indebtedness of Shank & Shoemaker to the bank was not increased after the execution of the plaintiffs' mortgage. We think the plaintiffs failed to establish their case independently of the special ground upon which their complaint was dismissed at the trial. It is now settled that a National bank may lawfully take a mortgage to secure future indebtedness. *National Bank* v. *Whitney*, 103 U. S. 99; *ante* 5.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Raynor v. Pacific National Bank.

(93 N. Y. 871.)

Attachment — against insolvent bank.

An attachment issued against an insolvent National bank is invalid (U. S. R. S., § 5142), and is not made valid by the subsequent acquisition by the bank of further capital.

Although the bank after the issuing of the attachment paid a large amount of its debts in full, this does not estop it from questioning the validity of the attachment.

The provision of the National Banking Act prohibiting attachments in such cases is not repealed by the act of Congress of July 12, 1882, providing that

the jurisdiction for suits thereafter brought against National banks shall be the same as for suits against State banks, and repealing laws inconsistent therewith.

APPEAL from order affirming order vacating an attachment herein. The facts are stated in the opinion.

Matthew Hale, for appellants.

Willard Bartlett, for respondent.

RAPALLO, J. The attachment was issued on the 9th of January, 1882. If at that time the defendant was insolvent, or in contemplation of insolvency, or had committed an act of insolvency, the attachment was prohibited by section 5242 of the Revised Statutes of the United States, and the order setting it aside should be affirmed. *Robinson* v. *Nat. Bank of Newberne*, 81 N. Y. 385; 37 Am. Rep. 508; 2 Nat. Bank Cas. 309.

We think the evidence submitted to the court below was ample to sustain its conclusion that the bank had committed an act of insolvency, and was insolvent when the attachment was issued; where it is conflicting we do not review it. The affidavit on which the attachment was granted stated that the bank was in an embarrassed condition and was about to, or had failed; the affidavit of the bank examiner showed that the bank had been insolvent since the 18th of November, 1881, and its doors had been closed since that time; that its debts and obligations greatly exceeded the total value of all its available assets. On the 22d of May, 1882, it was placed in the hands of the receiver.

At the time of the issuing of the attachment, January 9, 1882, the property and affairs of the bank were actually in charge of Daniel Medham, a National bank examiner, under the direction of the Comptroller of the Currency. The report of the examiner clearly shows that at that time the bank was insolvent to a large amount, there being a deficiency in its assets of over $1,000,000. Afterward by an assessment upon its stockholders, and voluntary aid extended to it by its directors, it placed itself in such condition that it was enabled in March, 1882, to resume business for a short period, but ultimately failed, and was officially declared insolvent on the 22d of May, 1882.

The condition of the bank at the time the attachment was issued is the material point. The attachment having been issued when the bank was clearly insolvent, it was illegally issued, in violation of the statute, and could not be made valid by the subsequent acquisition by the bank of further capital. If the attempt to restore the bank to a sound condition had been successful, probably further litigation on the subject of the attachment would have been unnecessary, for all the debts could have been paid. But the resuscitation was only of short duration; during its brief continuance the bank paid a large amount of debts in full, and the plaintiffs now urge that this fact should estop it from setting up its insolvency to avoid the attachment of the plaintiff. But it must be observed that the application to set aside the attachment is not made by the bank for the benefit of its stockholders, but is made for the benefit of the remaining creditors, and the fact that the fund to which they look for the payment of their claims has already been depleted by the payment to some creditors in full is no reason for permitting other preferences to be obtained.

Since the argument of this case our attention has been called to section 4 of the act of Congress of July 12, 1883, which it is claimed operates as a repeal of section 5242 of the United States Revised Statutes. We do not think that such is its effect. In the first place the section referred to applies by its express terms only to suits thereafter brought against National banks. Secondly, it provides merely that the jurisdiction for such suits shall be the same as for suits against State banks. The repeal is only of laws inconsistent with the above provision. We do not see that the law which prohibits the issuing of attachments against insolvent National banks conflicts with the provision in regard to the courts in which suits against such banks may be brought. There is no inconsistency in conferring jurisdiction of the suits on certain courts, and at the same time prohibiting suitors in those courts from issuing attachments in such suits, which will result in giving to the suitors preference over other creditors of an insolvent bank. One provision relates to the jurisdiction of the courts to entertain the suits, the other to a particular proceeding in such suits, which is prohibited in cases of insolvency. It cannot be supposed that

Congress intended to throw the door open whereby diligent creditors might obtain preferences by means of attachments, while retaining all the other provisions of section 5242, designed to guard against such preferences. The language of the act of 1883 does not manifest any such intention.

The order should be affirmed, with costs.

All concur, except ANDREWS, J., absent.

Order affirmed.

CITY NATIONAL BANK OF POUGHKEEPSIE v. PHELPS.

(97 N. Y. 44; 49 Am. Rep. 513.)

Change from State bank — guaranty.

A National bank, changed from a State bank, may maintain an action on a continuing guaranty for loans, held by it before the change, for loans both before and after the change.

ACTION on a guaranty. The head-note and opinion show the point. The plaintiff had judgment below.

Edward S. Clinch, for appellant.

H. A. Nelson and *W. Farrington*, for respondent.

RAPALLO, J. On the former appeal in this case, 86 N. Y. 484, we decided that the plaintiff was entitled to recover of the defendant so much of the indebtedness of Woodruff to the City Bank, as was incurred before that bank reorganized as the City National Bank, and as remains unpaid. The same points were raised on that appeal which are now urged by the appellant, so far as the indebtedness above referred to is concerned, and in that respect there was no material change in the facts on the second trial.

The question of the liability of the defendant for indebtedness incurred by Woodruff after the City Bank reorganized as a National bank was not decided, nor necessarily involved, on the former appeal. The judgment then under review was one of non-

suit, and if the plaintiff had a right of action for any part of his demand, that was sufficient to require a reversal without regard to the amount recoverable. The case was therefore decided on the ground that even if it should be conceded for the time that the City National Bank could not make fresh advances to Woodruff and hold the defendant liable on the guaranty, he was liable at all events for the sums advanced by the City Bank, the obligations for which had been renewed, with the defendant's consent, by the City National Bank, which succeeded to all the rights of the City Bank.

On the present appeal, the point which was thus left undecided is distinctly and directly presented. On the second trial the plaintiff recovered the amount of three notes given by Woodruff to the City National Bank, viz., one of $500, one of $250 and one of $1,400. The first two, amounting to $750, were shown to have been given for a balance remaining unpaid, of the original advances made to Woodruff by the City Bank under the guaranty, and they consequently are covered by the decision in the former case. But the origin of the $1,400 note was not thus traced, and the evidence was to the effect that it was given for a balance remaining unpaid on a note for $2,000 discounted for Woodruff by the City National Bank July 26, 1869, after the reorganization, which had been reduced by payments, and renewed from time to time down to January 17, 1876, when the last renewal was given for $1,400, payable four months after date. In respect to this note, the judge on the trial charged the jury that the guaranty of Phelps & Kingman, which was a continuing guaranty, continued, and that the bank had a right to advance upon it to the extent of $5,000, so long as the firm of Phelps & Kingman existed, or so long as the bank holding the guaranty and acting upon it had no notice of the dissolution of this firm. And he further charges that when the change was made from the City Bank to the City National Bank whatever debt was due upon that guaranty vested in the City National Bank. Thus far the charge conformed to the decision of this court before referred to; but the judge went on to charge further that the guaranty continued so that the City National Bank could continue to advance upon it so long as it had no notice of the dissolution of the firm of Phelps & Kingman.

If this position is sustained, the $1,400 note stands upon the same footing as the notes of $500 and $250, and the reorganization of the City Bank, in pursuance of the National Banking Act, becomes immaterial to the present controversy.

In regard to this point FOLGER, J., in his opinion in the former appeal, says, 86 N. Y. 490: "As we view the case we need not pass upon the full scope of the point that the City National Bank cannot hold the defendant upon the obligation to the City Bank. The point, in its extent, rests upon the proposition that the plaintiff is a distinct corporation from the State City Bank; that they are distinct parties, and that the obligation of a surety to one party may not be availed of by another party. That this proposition applies to the change made by the City Bank from State to Federal jurisdiction, is not so easy of concession or refutation as it may seem at first sight."

The question was thus left open, and the case disposed of without regard to it. But it now becomes necessary to determine it, and, on consideration, we have come to the conclusion that it should be determined in accordance with the view expressed by the judge upon the trial, and by GILBERT, J., in his opinion in this case at General Term, 16 Hun, 158. The general scheme of the National Banking Act is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders or property, and without interruption of their pending business or contracts. All property and rights which they held before organizing as National banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts, and pending guaranties, as well as vested rights of property. Although, in form, their property and rights as State banks purport to be transferred to them in their new status of National banks, yet in substance there is no actual transfer from one body to another, but a continuation of the same body under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the National Banking Act.

The defendant Phelps in his letter of October 6, 1875, appears to have acted in accordance with this view. The guaranty was given to the City Bank in February, 1861. The organization as a National bank was in 1865. Woodruff appears to have gone on renewing the notes discounted for him by the City Bank, and also the note discounted for him by the City National Bank in 1869, down to the time the letter was written, October 6, 1875. Phelps then addresses the cashier of the City National Bank treating it as identical with the City Bank and speaking of the guaranty as an obligation given to "your bank," stating that he regarded the guaranty as good when given, and that he believes it "just as good now as it was then," showing his understanding that it continued to run in favor of the City National Bank. He continues, "so that I do not see the slightest advantage in having it renewed." This was in response to a request on the part of the bank to renew the guaranty. After the receipt of that letter and a verbal request from Phelps to continue business under the guaranty and to renew the notes, the bank went on renewing the paper of Woodruff, which it then held, down to April, 1876, soon after which date Woodruff failed.

A point is made by the defendant that at the time of the verbal request above referred to, Phelps said that Woodruff would pay $500 on the notes on each renewal, but that the bank allowed the renewals on payment of a smaller sum. On this point we concur with the learned judge who delivered the opinion at General Term, in holding that this proposed payment was not a condition of Phelps' consent to the renewal, but was held out by him as an inducement to the bank to accede to his request to give indulgence to Woodruff.

We do not think that the judge erred in submitting to the jury the question whether the plaintiff had notice of the dissolution of the firm of Phelps & Kingman when it discounted the note of July 26, 1869.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Morehouse v. Second National Bank of Oswego.*

(98 N. Y. 503.)

Usury — action for double interest — agreement.

In an action under U. S. R. S., § 5198, against a National bank to recover twice the amount of usurious interest taken on loans made by it to McRae, the defendant proved an oral agreement between it and McRae, whereby the latter agreed to settle and discharge all such claims against defendant, that the same be applied in payment of that part of his indebtedness to the bank not collected by it from any other source, and that he would not sue or allow suit to be brought against the bank on account of such illegal interest. In consideration thereof the bank agreed that it would satisfy so much of the indebtedness of McRae as remained after applying all other available collections, or would consent as a creditor to his discharge in bankruptcy, as he might request. At the time of the agreement, McRae was indebted to defendant in a large amount, and after applying all collections there remained due a sum much larger than the excessive interest, none of which indebtedness has been paid. *Held*, that the agreement operated as an immediate discharge and satisfaction of the claim of McRae against defendant.

Inconsistent action by the defendant, subsequent to the agreement, did not affect its legal operation.

ACTION by receiver of McRae, appointed in proceedings supplementary to execution, to recover, under the provisions of section 5198 of the Revised Statutes of the United States, twice the amount of excessive interest alleged to have been taken and received by the defendant from McRae, prior to November 1, 1876, on loans and discounts made by the bank to and for McRae, the amount of which excessive interest, as found by the referee, was $946.75. The head-note and opinions state the facts. Judgment for plaintiff.

S. C. Huntington, for appellant.

B. B. Burt, for respondent.

Andrews, J. The agreement of November 1, 1876, was, we think, a good defense to the action. The General Term sustained the finding of the referee, upon the ground that the agree-

*Reversing 30 Hun, 628.

ment, when made, was executory, that there was no subsequent execution of its provisions, and that the case was within the general principle that an accord without satisfaction is no bar to a suit upon the original cause of action. It is not however universally true that a cause of action on contract, or for tort, may not be extinguished by an agreement between the parties, although the agreement which is the consideration for the satisfaction is executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. *Kromer* v. *Heim*, 75 N. Y. 574; 31 Am. Rep. 491, and cases cited. It is plain also, that if one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the party owing the debt or duty, he cannot afterward enforce his original cause of action upon a mere failure by the other party to perform his promise, "for he has a remedy to compel performance." The agreement found by the referee from its very nature operated as an immediate discharge and satisfaction of the claim of McRae against the bank. The mutual promises of the parties were not dependent, so as to render the discharge of the claim of McRae conditional upon full performance by the bank of its promise. He agreed to settle and discharge his claim against the bank, and to apply the same in payment *pro tanto* of his indebtedness, and further that he would not sue, or permit any suit to be brought against the bank thereon. The bank, on its part, agreed in substance to make the application, and also to satisfy the remaining indebtedness, or consent to McRae's discharge in bankruptcy as he should elect. The agreement to set off the mutual debts became executed *eo instanti*. This point was expressly adjudged in *Davis* v. *Spencer*, 24 N. Y. 386. The law, acting upon the agreement itself, made the application without further act of the parties. It is true that the exact amounts of the mutual debts do not appear to have been ascertained at the time, but they were capable of ascertainment. In *Davis* v. *Spencer*, the account on one side was, as may be inferred, unliquidated, but this did not stand in the way of the application of the principle decided. The agreement not to sue, or to permit suit to be brought, also operated as a present release and discharge of McRae's cause of action.

Chandler v. *Herrick*, 19 Johns. 129; Add. Cont. 270. The agreement was not a technical release, but it operated as such, and the fact that it was not under seal, or was oral, does not affect the application of the principle. *Foster* v. *Purdy*, 5 Metc. 442; *Davis* v. *Spencer*, *supra*; *Farmers' Bank* v. *Blair*, 44 Barb. 641. The only part of the agreement which was executory was the undertaking on the part of the defendant to satisfy the remaining indebtedness of McRae, or to consent to his discharge in bankruptcy at his option. The performance of this part of the agreement depended upon a prior request or election of McRae. If the bank on request should refuse performance, McRae has a remedy in an action for damages, or he can await proceedings by the bank to enforce the balance of the debt, and defend himself under the agreement. But his original claim against the bank was merged and satisfied. The claim that the bank took proceedings subsequent to the agreement, inconsistent with it, is irrelevant here, assuming that it is well founded. It was a proper matter for the consideration of the referee, bearing upon the point whether the agreement claimed by the defendant was made; but the agreement being established, its violation by the defendant would not affect its legal operation. There is no ground for saying that the agreement was released or discharged, or in any way became inoperative. We are of opinion that upon the agreement found, the defendant was entitled to judgment. This renders it unnecessary to consider the other questions.

The judgment should be reversed.

All concur, except RUGER, C. J., not voting.

Judgment reversed.

Corn Exchange Bank v. Blye.*

(101 N. Y. 303.)

Replevin — receiver — section 5242, U. S. R. S.

A party claiming title to property in the possession of a receiver of an insolvent National bank, which came to his possession with other property belonging to the bank, may, upon his refusal to deliver the same, maintain an action of replevin therefor.

Such a proceeding is not prohibited by section 5242 of the United States Revised Statutes.

APPEAL from order of General Term of the First Department reversing order of Special Term vacating a requisition issued by plaintiff to the sheriff of the county of Orange.

Defendant was appointed receiver of a National bank, before the commencement of this action, by the Comptroller of the Currency, pursuant to the provisions of the National Bank Act. This action was brought against him as such receiver to recover possession or the value of fifty bonds of the West Point Manufacturing Company.

The title of the bonds was disputed. On December 29, 1884, the plaintiff issued and delivered to the sheriff of the county of Orange a requisition under section 1694 of the Code of Civil Procedure, requiring him to replevy the bonds. Upon the defendant's motion this requisition was vacated by the Special Term. The General Term reversed the order of the Special Term, and defendant appealed.

Section 5242 of the United States Revised Statutes, referred to in the opinion, is as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt, owing to any National banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating

*Affirming 37 Hun, 473.

notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, county or municipal court."

Wm. Vanamee, for appellant.

L. A. Gould, for respondent.

FINCH, J. The sole question in this case is, whether section 5242 of the United States Revised Statutes prohibits the requisition issued to the sheriff, and protects the receiver in his possession. The Bank of Middletown became insolvent, and the defendant was appointed its receiver under the Federal law. That appointment vested in him all the assets of the bank to be converted into money and distributed among the creditors. The object sought to be accomplished is the distribution of those assets fairly and without preferences, and that has been held to be the aim and purpose of the section in question. *Robinson* v. *Bank of Newberne*, 81 N. Y. 385; 2 Nat. Bank Cas. 307; *Rosenblatt* v. *Johnston*, 104 U. S. 462; *ante* 32. It specifically prohibits all transfers of the corporate property made with a view to preferences, and so protects the creditors from any voluntary act of the bank, which selects out favored individuals for payment. But the bank may be passive, and such individuals gain a preference by a suit against the corporation preceded or accompanied by an attachment or injunction, or, after judgment, enforced by an execution. These three things therefore were specifically prohibited by name; each being process well known and accurately defined in the law; and without any general words to carry the prohibition beyond them.

The receiver, by his appointment, acquires no right to property in the custody of the bank which the latter does not own as against the real owner; and the section in question was plainly not intended to protect the receiver's custody as against such owner. It aims to protect the property of the bank in his hands, and not to give him arbitrary control of what the bank does not own. If the latter should be held, its injustice is well suggested by the General Term in its application to special deposits of customers left merely for safe-keeping. It does not alter the case

that there is here a dispute about the title and the receiver claims to be owner. He might make such claim in any case. No law makes him the inevitable stakeholder pending the litigation. He may become so by giving the needed security, and we can see no just reason why he should be exempted from that obligation which falls upon others. The plaintiff is required to give such security as the condition of his writ, and the receiver need run no risk in the performance of his duty. It is said the word "attachment" is used, not in the local sense affixed by State enactment, but in a broader sense, and the definition of Bouvier is cited. But by that definition and in every use of the term, it always assumes title in the person against whom the writ issues, and seeks to hold possession of his property, and on the ground and for the reason that it is his. No nomenclature has ever made it the equivalent of a writ of replevin, which issues upon a theory exactly the reverse. There is no collision of jurisdictions. The authority of the Federal courts over the assets, and the right of its officer to hold them is not questioned or invaded. No property over which those courts have obtained jurisdiction is interfered with. What is sought to be recovered is property over which they have obtained no jurisdiction, and as to which they have conferred no right upon him.

The order should be affirmed, with costs.

All concur, except MILLER, J., absent.

Order affirmed.

IN RE MCMAHON v. PALMER.

(102 N. Y. 176.)

Taxation — assessment — bank shares — constitutionality.

Section 7 of chapter 302 of the Laws of 1859, requiring the deputy tax commissioners to personally examine "each and every house, building lot, pier and other accessible property," and furnish the commissioners of taxes a detailed statement of the same, etc., as such commissioners may require, etc., refers only to real property.

The oath required by the act to be made by the deputy to the statement returned to the commissioners may be taken at any time after examination of the property and before the filing of the statement on the second Monday of January thereafter.

The entry of assessments for National bank shares upon a list or book separate from other assessments for personal property against individuals in the city of New York does not render the assessment void; and does not violate section 5219, U. S. R. S.

The assessment and collection of taxes constitute due process of law within the meaning of the Constitution.

APPEAL from an order in a special proceeding under chapter 230, Laws 1843, committing the appellant to the jail of the city and county of New York for neglect to pay alleged personal taxes upon certain National bank stock.

Wm. H. Field, for appellant.

D. J. Dean, for respondent.

RUGER, C. J. Upon an application by the receiver of taxes of New York to the Court of Common Pleas of that county the appellant was adjudged guilty of misconduct in refusing to pay the tax assessed upon his personal property for the year 1881, and a fine was imposed upon him therefor. The proceeding was had under the provisions of chapter 230, Laws 1843, and was conducted in conformity therewith. The tax in question was predicated upon the customary annual assessment of property liable to taxation under the general laws of the State, but was in this instance based upon an assessment of the value of National bank shares owned by the appellant. The number of shares so owned by the defendant and the estimated value thereof was furnished by him to the assessment officers, and upon the information thus obtained with that derived from other sources said shares were appraised at their actual value and placed in the assessment lists provided for the enrollment of property of that description. Certain irregularities are alleged to have occurred in the proceedings for the assessment of the property which it is claimed were jurisdictional in character and ought to render such assessment invalid and the tax levied thereon void.

It is quite true if any act which was required by law to be performed by the assessment officers and which is made thereby the condition of a valid assessment has been omitted by them, it will render the assessment void. We have been unable however to find any such irregularity in the proceedings. Those claimed to exist are the following:

That the deputy tax commissioners failed to comply with section 7 of chapter 302 of the Laws of 1859, which required them personally to examine "each and every house, building lot, pier or other assessable property," and furnish under oath to the commissioners of taxes and assessments a detailed statement of such property, with the name of the owner or occupant, "with such other information in detail relative to personal property," as said commissioners may from time to time require. This provision very obviously refers only to real property except in the clause expressly referring to personal property, and there is no claim that that requirement has been omitted. This view of the statute was assumed by this court in *Brevoort* v. *City of Brooklyn*, 89 N. Y. 128, and seems to be required by the plain inapplicability of the provision to assessments of personal property.

It is also claimed that the oath required to be made to the statement directed to be returned by the deputy to the commissioners of taxes and assessments was improperly made, in that it was sworn to on the 8th, instead of the second Monday of January, being the 10th. There is no provision requiring such oath to be made on any particular day, and the whole object and intent of the statute in respect thereto is complied with, provided it be taken after the examination of property is made by the deputy commissioner and before the statement is filed with the commissioners on the second Monday of January thereafter.

It is also claimed that the entry of the assessments for National bank shares upon a list or book separate from other assessments for personal property against individuals in the city renders such assessment void. It is provided by section 3, chapter 596, Laws of 1880, that "such shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank, banking association or trust company is located and not elsewhere, whether

the stockholder resides in said place, city, town or ward or not." Sections 4 and 5 of chapter 410 of the Laws of 1867 provide for the assessment of personal property in the city of New York, upon separate rolls from that of real estate. In the general laws of the State, the personal property of an individual is required to be assessed against him in the place of his residence, and assessments of real estate follow the location of such property.

It must follow as the necessary consequence of these requirements when the individual assessed does not live in the same ward in which the bank is located in which he owns shares, and does not own real estate therein, that his assessment for bank shares must be made upon lists especially prepared for that purpose, in the ward where it is located, or the property must altogether escape assessment and taxation. The familiar rule that a statute must be so construed as to give it effect and to avoid a result which would render it inoperative, if it be reasonably susceptible of such an interpretation, would seem to require us to sanction the only mode of assessment which seems capable of securing the benefits designed by the statute.

It is also clear that the tax payer has not been deprived of any substantial benefit by the mode thus pursued. The statute gives information to him of the place where the roll is to be deposited for examination and the length of time during which it is to be there kept for inspection, and of his opportunity during such time to apply to the proper officers for the correction of any errors which he may find in his assessment. Not only this, but the commissioners of taxes and assessments are also required to advertise the fact of the completion of the annual record containing all assessments upon property in the city of New York, and the time when the same shall be ready for inspection by tax payers, and to keep the same in the tax commissioners' office open for that purpose from the second Monday in January to the 30th day of April thereafter. There is no complaint but that these requirements were complied with, or but that the appellant had actual notice of the assessment in question in ample time to procure its correction if any error existed therein; in fact it affirmatively appears that the relator did appear before the commissioners of taxes on the 12th day of April, 1881, and made affidavit upon which he pro-

cured a substantial reduction of the assessment in question. *Matter of De Peyster*, 80 N. Y. 572; *Matter of Lowden*, 89 id. 548.

It does not appear that there is any provision of law requiring the assessments of individuals for bank shares in New York to be made otherwise than in the mode adopted in this case, and in the absence of such provisions we do not see why the practice here pursued was not in harmony with the general regulations applicable to the subject and did not afford to the appellant the same opportunity and notice of the assessment in question that was given to all other tax payers of similar assessments in New York. There is nothing in section 5219 of the Revised Statutes of the United States, which either impliedly or expressly condemns the mode of registering the assessment adopted in this case. That section provides that nothing contained in that act shall prevent the shares owned by an individual in a National bank from being included in the valuation of his personal property in assessing taxes imposed by the authority of the State in which the bank is located. The mere ministerial act of the officers in estimating and noting the result of the judicial determination as to the liability of the individual, and the value and assessability of his personal property, provided such act does not produce an inequality of assessment, are not affected by the provisions of the section. The section purports only to affect the judicial act of the assessors in including the value of bank shares in the assessments of property and not to regulate its exercise except in respect to the rate of taxation and assessment adopted. The provisions pertaining to the assessment of bank shares in New York are essentially different from those considered by Judge WALLACE in *Albany City Bank* v. *Maher*, 19 Blatchf. 174. The views there expressed are inapplicable to the modes of assessment prescribed in the city of New York, and apply only to cases where the assessment of both real and personal property are required by statute to be made on the same book or roll. The views we have expressed are sustained by the decisions of this court. *Foster* v. *Van Wyck*, 2 Abb. Ct. App. Dec. 167, and also by *Williams* v. *Weaver*, 75 N. Y. 30, which in this respect was unaffected by the subsequent proceedings in that case.

There are no other objections affecting the regularity of the proceedings for assessment which are of sufficient importance to merit notice.

It is further objected by the appellant that "the system of taxing the appellant's National bank shares resulted in taxing the moneyed capital invested in them at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State invested in other investments." The particular ground upon which the appellant bases this point is the claim that "there is no law upon our statute books for the taxing of shares of stock of railway companies, street railways, ferry and canal companies, fire and life insurance, trading and other miscellaneous companies, and the deposits in savings banks." This claim seems to be unfounded in fact. A careful examination of the statute, and a comparison of the burdens laid upon the property, capital and business of the people under the laws of the State will show that the money invested in National banks is subjected to no greater burden than that imposed upon other species of assessable property. Capital invested in National banks is taxable only upon the individuals owning shares therein, and for the purpose of such taxation is assessable like all other personal property liable to taxation in the State, at its actual value. Such shares were originally made assessable by chapter 761 of the Session Laws of 1866, under the authority of the act of Congress, section 5219, which expressly permitted such assessment, subject only to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and that the shares of such stock owned by a non-resident of the State shall be taxed in the city or town where the bank is located and not elsewhere. The act of 1866 was amended by chapter 596 of the Laws of 1880, and chapter 477 of the Laws of 1881, so as to authorize the allowance to a tax payer upon bank shares of all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of the State. The only result of this legislation has been to bring the capital invested in National banks within the taxing power of the State, and place it on

terms of equality with reference to general taxation with all other assessable personal property therein.

The general laws of the State require all property, both real and personal, no matter by whom owned, except in certain cases of special exemption, to be assessed for purposes of taxation. This requirement embracing all property owned by individuals as well as corporations and including all shares of stock held by individuals in corporations, except in cases where the capital stock of such corporations is itself liable to taxation as against the corporation. R. S. (7th ed.) 981, 982, §§ 1–7; id. 1036, §§ 1–2. By special provision of law, all assessments upon capital employed in banking corporations, whether National or State, are required to be made in the same manner and to have in view the placing of these institutions on terms of absolute equality. Chap. 140, Laws 1880. The various railroad, ferry, canal, manufacturing and other industrial corporations, referred to by the appellant, are not only liable to taxation either upon their capital stock or upon their shares held by individuals, which are substantially the equivalents of each other, but are also subject to contributions from their gross receipts, taxes upon franchises, and other impositions from which bank capital is altogether exempt. Chap. 456, Laws 1857; chaps. 534 and 542, Laws 1880; chap. 477, Laws 1881; R. S. (7th ed.) 982, § 7. Our system of laws with reference to the taxation of incorporated companies and capital invested therein has been carefully framed with a view of reaching all taxable property and subjecting it to equality of burden so far as that object is attainable in a matter so complex. In view of the wide variation in the employable value of such investments and the frequent mutations in their condition, it is by no means certain that their object has not been attained with reasonable accuracy. It is quite clear from even this cursory review of the statutes that if any discrimination is made by our laws in taxing capital invested it is not to the prejudice of that employed in banking corporations.

Even if this were not the result of the statute we are of the opinion that investment in the shares of the companies named does not come within the meaning of that clause in the Federal statute referring to other moneyed capital in the hands of indi-

viduals. That phrase as generally employed distinguishes such capital from other personal property and investments in the various manufacturing and industrial enterprises of citizens, and this is the sense in which it is used in our Tax Laws, as appears by reference to the statutes. R. S. (7th ed.) 982, §§ 3 and 4; chap. 195, Laws 1845; chap. 456, Laws 1857; chap. 240, Laws 1863; R. S. (7th ed.) 1036, § 1; chap. 542, Laws 1880, and the laws amendatory thereof. Such is also believed to be the meaning attached to such words as generally used in the Federal statute. The obvious intent of the Federal statute was to prevent discrimination against investments in National bank shares and put them upon terms of equality as to taxation with similar institutions and investments in the several States, and the language of the statute seems to have been selected with reference to that object. The rule of comparison is not with the rate of taxation imposed upon personal property generally or with specific investments in mining, manufacturing or the various other industrial corporations organized throughout the State, but with other "moneyed capital" in the hands of individual citizens. These are words of limitation as well as of description, and are to be defined according to the meaning which has been generally given to them.

It was said in *Evansville Bank* v. *Britton*, 105 U. S. 324; *ante* 48, that "the act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State but the tax on moneyed capital in the hands of the individual citizen." "Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption because personal property is not necessarily moneyed capital." In *Providence Institution for Savings* v. *Boston*, 101 Mass. 583; 1 Nat. Bank Cas. 578, it is said, "that this clause was obviously intended to preclude the possibility that property of that description should be singled out for special and peculiar taxation. Its operation would be to prevent oppressive and hostile discriminations unfavorable to the banks." It might well seem reasonable to Congress to take some precaution that the banks in each State should be taxed only at the same rate and generally in the same manner as the moneyed capital of individual citizens in the same State. It was claimed in *Hepburn* v. *School*

Directors, 23 Wall. 481; 1 Nat. Bank Cas. 113, that the words "moneyed capital" as used in the act signified only money put out at interest, but the court there held that such a construction was too narrow and that the phrase included stocks in banks and perhaps other stocks and securities. The court in that case further held that the exemption of some moneyed capital from assessment did not necessarily invalidate a statute authorizing an assessment upon National bank shares, saying that "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

We are therefore of the opinion even if it could be shown that there were some corporations, or some personal property that was subject to a less rate of taxation than that of capital employed in banking corporations, it would not vitiate the law imposing taxes upon shares in banks, unless it appeared to be the clear intent of the Legislature thereby to effect discrimination against them.

It is further claimed "that the proceedings under chapter 230 of the Laws of 1843 would deprive the appellant of his property and liberty without due process of law." There is no foundation for this claim.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and not judicial in their character, and to constitute due process of law within the meaning of the Constitution. Such proceedings have from necessity been exercised by governments during all times by summary methods of procedure, and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power by government would seriously cripple its efficiency if not destroy its existence. These methods were in exercise and existence long before the adoption of the Constitution, and have never been supposed to be affected thereby. *In the Matter of The N. Y. P. E. Public School*, 31 N. Y. 584, Judge Denio says, that "in executing the taxing power, the Legislature provides such agencies and safeguards against surprise, mistake or injustice as it thought expedient. It is manifestly proper that the tax payers should have notice of the imposition proposed to be laid upon them and an opportunity for making suggestions and expla-

nations to the proper administrative board or officer; and this is generally secured in all well-considered systems of taxation. But it is for the Legislature to determine and prescribe, in every case, what should be sufficient, and there is not, that I am aware of, any constitutional provision bearing on the subject." Judge PORTER in *Rockwell* v. *Nearing*, 45 N. Y. 308, says: "There are many examples of summary proceedings which are recognized as due process of law, at the date of the Constitution, and to these the prohibition has no application." The Supreme Court of the United States in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, stated, "that probably there are few governments which do or can permit their claims for public taxes either on the citizen or the officers employed for their collection or disbursement to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has formed a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by systems of fines and penalties, but always in some way observed and yielded to. See also *McMillen* v. *Anderson*, 95 U. S. 37; *Harris* v. *Wood*, 6 Monr. 642; *Weiner* v. *Bunbury*, 30 Mich. 201.

As we have seen, the appellant had full notice of the proceedings for the imposition of the tax in question and an opportunity to question their correctness by proceedings to review the action of the assessing officers if he had felt aggrieved thereby, but having omitted to exercise that right he is now estopped from raising any question affecting the regularity of the proceedings or the exercise of the judicial powers conferred upon the assessors in making the assessment in question.

We have thought it unnecessary to discuss other answers to the points raised, and other questions presented upon the briefs of counsel, as they are either embraced in what has been already said, or are too plain to require serious notice.

The order should be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.

Prosser v. First National Bank of Buffalo.

(106 N. Y. 677.)

Stock — ownership. Appeal — record — review of evidence.

L. was president of the defendant National bank, and had substantial control and management. He bought fifty shares of defendant's outstanding stock, and paid for it with the proceeds of a note, signed by M., the cashier, which he indorsed and placed in the bank as discounted paper. He afterward bought one hundred and forty-eight shares, and paid for them by an ordinary call-loan from defendant. On subsequently selling a portion of the stock, L. applied the proceeds to the note and call-loan. He did not assume to act for defendant, and the stock was transferred to him individually, and was in his name on the books. He had no actual authority to buy the stock for defendant; but the evidence tended to show that the purpose of the purchase was to get the stock into the hands of persons who would be useful to defendant. In an action for fraud in a subsequent sale of such stock by L., *held*, that defendant could not be charged as owner of the stock.

On the question whether the president represented defendant to be the owner of the stock, plaintiff testified that in the conversation resulting in the sale, the president stated that "we can sell you some of our stock" at 160, and that that was "the price that the bank took it in at." Plaintiff did not inquire as to the ownership. The president testified that while he might have stated that "we have some stock," his best recollection was that he did not say "the bank took it in." No motive appeared for his representing defendant to be the owner. *Held*, that the evidence sustained a finding negativing such representations.

An appeal from an order of reversal, which does not state that the reversal was upon questions of fact, brings up for review only questions of law.

A finding of fact by the trial court upon sufficient evidence, and not reversed by the General Term, is conclusive on appeal to the Court of Appeals.

APPEAL from General Term of the Buffalo Superior Court.

John G. Milburn, for appellants.

James F. Gluck, for respondent.

Earl, J. The complaint alleges the incorporation of the defendant bank, and that R. Porter Lee was duly elected president thereof on the 10th day of January, 1882; that on or about the

21st day of the same January, the plaintiff was solicited by the president of the bank to purchase some of the stock of the bank, and that as an inducement thereto the bank, through the president, stated to the plaintiff that it was in a solvent and flourishing condition; that its bad and doubtful debts did not amount in all to the sum of $50,000, and that if it should then be wound up the stockholders would receive a premium of at least $60 on every $100 worth of stock held by them; that such representations were false and untrue to the knowledge of the president, and the bank was at the time insolvent; that relying upon such representations, the plaintiff purchased fifty shares of the stock owned by the bank, and paid the bank therefor the sum of $8,000, and received a certificate therefor signed by the president and cashier; that by means of such purchase and the subsequent failure of the bank, the plaintiff became liable to contribute toward the payment of creditors of the bank the sum of $5,000 under the National Bank Act; that by reason of such purchase and failure the plaintiff has sustained damages in the sum of $13,000; that a receiver of the bank was duly appointed on the 22d day of April 1882, and that he has filed with such receiver proof of his claim for such damages, and demanded of him payment thereof, and has also tendered the certificate of the stock to him, and offered to surrender the same and demanded the sum paid therefor, which was refused. And the prayer for relief is as follows: "Wherefore this plaintiff demands judgment against the defendants, declaring the purchase of said stock void and setting the same aside, and for the payment to him out of the assets of said bank as a preferred creditor of the sum of $13,000, with interest as aforesaid from the 21st day of January, 1882, or for such other or further or different relief as the court, from all the facts, shall deem adequate, equitable and just." It is thus seen that the precise and only cause of action alleged is the damages sustained by the plaintiff in consequence of the purchase by him from the bank of certain shares of its stock belonging to it, which purchase was induced by certain false and fraudulent representations as to its financial condition made on its behalf by its president. The answer put in issue the ownership and the sale of the stock by the bank and the alleged false representations.

The action came to trial before a judge and a jury, and the following questions were submitted to the jury: (1) Were the representations made by Mr. Lee about the financial condition of the bank at the time of the purchase of the stock by Mr. Prosser false and untrue? (2) Did Mr. Prosser rely upon those representations in the purchase of the stock and believe them to be true? (3) Was the bank insolvent at the time these representations were made? (4) Did Mr. Prosser make the contract of purchase with Mr. Lee as the agent of the bank? (5) Did the bank own the stock? (6) Did the bank get the money? The jury answered the first, second and third questions in the affirmative, and the other questions in the negative. Thereupon the trial judge heard further evidence, and subsequently filed his decision containing findings of fact and of law. Among his findings of fact are the following: "The said bank did not make to said plaintiff, through its president or otherwise, the statements and representations touching the condition of said bank, or in respect to the stock thereof, which are in that behalf in said complaint set up and alleged, or either of them;" "that said plaintiff did not purchase of said bank said fifty shares of its stock, or pay said bank therefor, but he purchased the same of R. Porter Lee, and paid him therefor;" and he found as conclusions of law that the plaintiff was not entitled to the relief demanded by him, and that the complaint should be dismissed. Thereafter, before the entry of judgment by the consent of the parties, an order was entered staying further proceedings that the plaintiff might prepare a case and exceptions as recited in the order, "to the end that all questions of fact in the case, and especially the fourth, fifth and sixth findings of the jury alleged by the plaintiff to be irregular and incorrect, may be fully considered by the court prior to the entry of judgment herein."

The motion for a new trial was subsequently brought on, heard and decided, and thereafter judgment was entered dismissing plaintiff's complaint From that judgment plaintiff appealed to the General Term, and there the judgment was reversed, and a new trial ordered. The order of reversal does not specify that the reversal was upon questions of fact, and therefore its justification must be found in some error of law revealed by the record.

Several interesting questions of law are discussed with much ability and learning in the brief of the plaintiff's counsel which we do not deem it important to determine. We will assume that if this stock belonged to the bank, and the president disposed of it to the plaintiff, making the representations alleged in the complaint, this action could be maintained; and we will further assume that if the president represented to the plaintiff that the stock belonged to the bank, and sold it to him assuming to act for and to represent the bank, the action could be maintained, although the bank did not own the stock. But the fundamental difficulty with the plaintiff's case is that the bank did not own the stock, and that the president did not represent that it owned the stock, nor assume to act for it or on its behalf in making the sale thereof to the plaintiff. The finding of the trial court to this effect, sustained by sufficient evidence and not reversed at the General Term, concludes us.

As to the ownership of the stock, there is no real dispute upon the evidence. The United States Bank Act (U. S. R. S., § 5201) prohibits a National bank from making any loan or discount on the security of the shares of its own capital stock, and from purchasing or holding any of such shares unless it becomes necessary to prevent loss upon a debt previously contracted in good faith. The capital of the bank was $100,000, divided into one thousand shares of $100 each. Lee entered the bank in the spring of 1868 as messenger boy, and remained in that position for about three months, when he was made a book-keeper. Then he became successively teller, assistant cashier, cashier, vice-president, and finally, on the 10th day of January, 1882, about three months before the failure of the bank, president. On the same 10th day of January, one McKnight was chosen cashier of the bank. At that time Lee owned more than one-half of the capital stock of the bank, and the directors allowed him substantially to control and direct the financial affairs and business transactions of the bank. On the 11th day of January he entered into contract with Mrs. Stagg for the purchase from her of fifty shares of the capital stock of the bank for the price of $6,500, and to obtain the money to pay for such stock McKnight, at his request, made a note for $6,500, which he indorsed and placed in the bank as dis-

counted paper. He then drew from the bank $6,500 to pay Mrs. Stagg for the stock, and took a transfer thereof. On the 18th day of January he bought of one Vought one hundred and forty-eight shares of the bank stock, at $160 per share, and to pay for the same, he made a call-loan from the bank of $23,600, and then obtained a New York draft from the bank, which he delivered to Vought in payment of the stock. The call-loan was made to him in the same way that call-loans were made to other customers of the bank, but without any security. In purchasing these two parcels of stock he did not assume to act for the bank, but he negotiated for and purchased them in his own name. They were transferred to him individually, and all this stock stood in his name on the books of the bank on the 21st day of January, when he made the sale to the plaintiff. The money received by Lee upon the sale to the plaintiff was used by him to pay the note held by the bank for $6,500, and to apply in reduction of the call-loan.

Lee had no actual authority to buy this stock for the bank, and he could have no implied authority to buy it, and thus violate the law, and he did not in fact buy it for the bank. The evidence tends to show that he purchased this stock for the purpose of getting it out of the hands of persons who were not useful to the bank, and selling it again to persons who would be useful, and in this way he expected and intended to benefit the bank and its stockholders. But this did not make the bank owner of the stock, or the purchase thereof a bank transaction In taking the funds of the bank to make the purchases, Lee committed a breach of trust, and upon familiar principles of law the bank could have followed its funds into the stock before a sale thereof and claimed the same. But it was optional with it whether it would do this or not. It could have relied for indemnity entirely upon Lee, and held him as its debtor for the sums taken, refusing to take and allowing him to retain the stock; or it could have treated him as a trustee of the stock for it, and enforced the trust for its benefit by compelling a transfer or sale of the stock for its account. But the bank never claimed the stock. Some of it was sold, and the proceeds applied in repayment of the sum unlawfully taken from the bank, and thus there is no reason whatever for saying that the bank in any way became the owner of the

stock. Suppose, instead of buying stock, Lee had bought for himself a steamboat with the funds taken from the bank. It could have followed its funds into the steamboat, and claimed the same. But it would not have been obliged to do so, and its option to do so would certainly have been lost when the boat had been sold, and the proceeds of the sale used to replace the funds unlawfully taken. We therefore conclude that the bank did not own this stock, and had no stock to sell.

There was some evidence that Lee represented that the stock belonged to the bank, and that he assumed to sell it for the bank. But such evidence was not conclusive. The trial court found the fact to be otherwise, and its finding does not present an error of law unless it was unsupported by any evidence, or was against the evidence. The finding not disturbed by the General Term concludes us, if there was any evidence upon which it could properly be based, and that there was such evidence seems to us reasonably clear.

As we have already shown, the stock did not belong to the bank, stood on the books of the bank in Lee's name, and was by him transferred to the plaintiff. On the face of all the papers, it was the individual transaction of Lee with the plaintiff. Independently of the evidence to which we will now call attention, it is highly improbable that Lee would sell his own stock as the stock of the bank. There was no reason for his doing so. The plaintiff wanted to buy the stock, and it must have been a matter of utter indifference to him who owned it. All he wanted when he purchased was a good title, and that he could get as well from Lee as owner as from the bank. He had confidence in Lee, as he was willing to buy knowing that he had substantial control and management of the bank. There was no motive therefore for selling the stock as belonging to the bank, or for making the false representations that the bank had bought the stock and then owned it; and the presumption is very strong that the transaction was what upon the face of the papers it appears to have been. The weight to be given to these facts, inferences and presumptions was for the trial court, and it was to determine whether it was overcome by the other evidence. All the other evidence came from the plaintiff and Lee, who was produced as a witness

by him. The plaintiff was an interested witness, and Lee, who had committed a breach of trust and a crime in unlawfully taking the funds of the bank, and who had by false representations committed a gross fraud upon the plaintiff, was a discredited witness; and it was for the trial court to determine how much credit should be given to the evidence of these witnesses, and how much it should weigh against the facts, inferences and presumptions referred to; and it would not have been error of law if it had wholly discredited it, as it was quite improbable so far as it tended to show that Lee did the absurd and useless thing of selling his own stock as the stock of the bank.

The whole of the plaintiff's evidence touching the ownership of the stock and the representations of Lee in reference thereto is as follows: "On the 21st day of January, 1882, having previously left my bank-book at the bank to have some interest credited to me, I called for the book. Mr. Lee, apologizingly, said that he had instructed the book-keeper to allow me interest, which the book-keeper had before stated to me that he was not authorized to do. The book-keeper brought me my book with some interest credited to me. I had quite a balance there for me, and noticing the amount of interest, I thought it small. The rate was four per cent. I had a balance there, and I desired to put it into something, and asked Mr. Lee if he knew of any thing good to buy. In response to that question he said: 'We can sell you some of our stock, if you would like.' I inquired how much he had for sale. He replied: 'Any portion of fifty shares.' I inquired the price. He said 160 — that he had sold a few small lots at that. I asked Mr. Lee if that was not rather steep — a large price. In response to that he said: 'We think not. It is precisely the price that the bank took it in at a few days ago, and which such men as S. O. Barnum and Charles D. Marshall have paid for small lots.'"

The plaintiff made no inquiry as to the ownership of the stock, and there was no distinct allegation as to it by Lee; and there was nothing in the conversation or negotiation between them which made the matter of ownership of any importance. The only item of this evidence which really supports the theory of the plaintiff is the alleged representation by Lee that the bank "took it in"

a few days before at the same price for which he offered to sell it. Whether that representation was made — whether what Lee said was misunderstood, misapprehended or incorrectly remembered — were matters for the determination of the trial court. In that portion of his evidence the plaintiff was not corroborated by Lee. He testified substantially as follows: "He came in again a day or two after that, and asked me if there was any stock of the First National Bank of Buffalo for sale. I told him there was a little in the market, and he wanted to know how much it was worth. I told him I had sold some for 160. He wanted to know if that was not pretty steep. I told him we thought it was worth that. He said he had bought a little of the Manufacturers and Traders' Bank stock, and had left an order for more; but he thought he would like to get some of ours. He asked me how the bank was fixed, and I took him into the back room and I think I drew him off an abstract of the statement of the books, and he took it away with him and looked at it over night. He came in the next day and asked if the loans were all good. I told him, 'You know every bank has some loans that are not good.' He asked me how much we had that was not good, and I told him if every thing came out all right as I expected, it would be pretty much all good. I think, after hearing his testimony to-day, that he did mention $30,000, and I think that I did tell him if every thing turned out as I expected it would, there would not be more than that amount of bad loans. He handed me a check for $8,000, and told me to make out a certificate for fifty shares. Q. What was said by you to him in relation to the ownership of the stock by the bank at that time? A. I think I told him 'We have the stock.' I find upon the transfer-book of the bank a transfer of this stock to Mr. Prosser. The written part of the certificate is in my handwriting, and it is as follows:

"'First National Bank. For value received I hereby sell, transfer and assign to E. S. Prosser fifty shares of the capital stock of the First National Bank, subject to all the conditions and liabilities of the articles of association and by-laws. Witness my hand in Buffalo this twenty-first day of January, in the year 1882. R. P. Lee.'

"It is not signed as president."

The plaintiff called Lee for further examination before the court, after the jury had made their findings and had been dis-

charged, and the following questions were put to him and answers given: "Q. Now, Mr. Lee, in the conversation that took place between yourself and Mr. Prosser in the bank, you may state whether or not you did not use words to this effect: 'We have some stock for sale?' In the course of that conversation were these words used in response to the question of how much it cost; Mr. Prosser having said, 'Don't you think that is pretty high?' And did you not say, 'That is the same price the bank took it in at a few days ago?' A. I don't remember using the expression 'took it in at a few days ago,' but I could not swear I did not use it. Q. Did a conversation of that purport take place?' A. Yes, sir — of that general purport; these two last points you have spoken of. By the Court: Mr. Lee, you have said, in a general way, that you have made some statement that was in substance to the effect of what the counsel stated. Did you state, and if you did, tell in what manner you stated, to Prosser that this stock belonged to the bank? A. My best recollection is that I did not use the expression 'of the bank.' But my impression is I used the expression 'we have some stock.' I do not think Mr. Prosser inquired particularly as to who the owner of the stock was. Q. You do not desire to be understood as swearing that the expression was not used? A. No, sir; that is my best recollection of it." It will thus be seen that Lee, testifying to the same transaction covered by the plaintiff's evidence, fails materially to confirm him. Taking the evidence of these two witnesses, as they gave it, it is by no means clear that there was any dealing as to stock of the bank, any representations that the bank owned the stock, or any assumption to sell it on behalf of the bank. But when all the circumstances with the inferences, probabilities and presumptions are weighed and considered, we think there was enough to authorize a finding that the stock was not sold as the stock of the bank, and that the dealing of the plaintiff in reference thereto was really as it was actually upon the papers, with Lee as owner. This conclusion upon the facts leaves the plaintiff without the cause of action alleged in his complaint, and it is not important to inquire whether he had any other cause of action against the bank growing out of his purchase of the stock from Lee and the representations made by Lee.

We have carefully examined and considered other exceptions to which our attention has been called, and we do not think any of them point out any error, and they are not of sufficient importance to require any attention here. The order of the General Term should be reversed, and the judgment of the Trial Term affirmed, with costs.

All concur, except RUGER, C. J., not voting.

MAYOR, ETC., OF NEW YORK v. TENTH NATIONAL BANK.

(111 N. Y. 446.)

Fraud — of directors — unauthorized advances — imputable to the bank — depository of city money — frauds of city officials.

Where a National bank which is a depository of the funds of a municipality acting by its president, makes in absolute good faith and in pursuance of a custom of the banks of the city, advances not authorized by law to a commission for building a court-house, upon checks regularly drawn and indorsed, and the Legislature, by a subsequent act, authorizes the repayment of such advances, the bank can recover the full amount with interest, although a part of the money so advanced was fraudulently misappropriated by certain of the city officials who were also directors in the bank.

APPEAL from a judgment of the General Term of the Supreme Court allowing a counter-claim of the defendant. The complaint alleges that the defendant was duly designated as one of the depositories of the moneys of the city and county of New York, and that between the 1st day of December, 1871, and the 31st day of May, 1873, large sums of such moneys were deposited with it, upon which it agreed to allow interest at the rate of four per cent upon daily balances, and that there was due it on account of such interest the sum of $550,000, for which judgment is demanded. The defendant in its answer, besides making various material denials, sets up as a counter-claim, that between the 29th day of April, 1871, and the 2d day of September, 1872, it had advanced to the commissioners of the new county court-house of New York, for the use of such commissioners, the large sums of money specified; that by chapters 9 and 29 of the Laws of 1872,

the comptroller of the city of New York, who was then the fiscal officer of the county of New York, was authorized and required to pay back to the defendant the moneys so advanced; that such commissioners were commissioners of the county of New York, and by chapter 304 of the Laws of 1874 the debt to it for the moneys so advanced was made a charge against and a liability of the city; that there is due to it for the moneys so advanced the sum of $242,579.97, with interest from February 1, 1872, for which judgment is demanded against the plaintiff. The plaintiff replied to the counter-claim, alleging various defenses thereto.

The judge, without a jury, found that the defendant was indebted to the plaintiff on account of the interest in the sum of $66,301.36, and that there was due to the defendant upon its counter-claim, after deducting the debt for the interest, the sum of $358,849.23, for which sum he ordered judgment in favor of the defendant. Other facts appear in the opinion.

Simon Sterne and *John H. Strahan*, for city.

Thomas Allison, for bank.

EARL, J. The learned and exhaustive argument by the counsel for the city has failed to convince us that the judgment appealed from is erroneous. The construction of the New York court-house seems to have been inaugurated by an appropriation in the act (chapter 509 of the Laws of 1860) of $100,000, "for the purpose of erecting suitable court-rooms for the accommodation of the several courts of the county." By the act (chapter 161 of the Laws of 1861), the board of supervisors of the county of New York was authorized and empowered to acquire and take for the purposes of building a court-house thereon such land in the city and county of New York as they might deem necessary for the purpose; and provision was made for taking and acquiring the land by condemnation proceedings, and for raising money on the credit of the county to pay for the same. By chapter 24 of the same year, and chapters 167 of 1862, 108 of 1863, 242 of 1864, 605 of 1865, 837 of 1866, 806 of 1867, 854 of 1868, and 875 of 1869, the board of supervisors was authorized to raise money for the construction and completion of the court-house. Under the

act of 1861 land was acquired from the city upon which to erect the court-house, and during all the years named the construction thereof was carried on by the board of supervisors through agencies employed by it. The bills for work and materials employed in the construction were audited by the board of supervisors like other county bills, and were paid by the comptroller of the city. Then the system for the construction of the court-house was changed by section 2 of the act, chapter 382 of the Laws of 1870, which authorized and empowered the mayor of the city to appoint four commissioners for the final completion of the "new county court-house," and provided that upon the appointment of the commissioners all power of the board of supervisors over the erection of the court-house should cease; that the commissioners should have the power to expend and should complete the court-house for a sum not exceeding $600,000, which amount the comptroller was authorized and directed to raise on the stock of the county, to be designated the "New York county court-house stock No. 4;" that the money so raised should be paid by the comptroller on vouchers approved by the commissioners. Under that act, on the 1st day of December, 1870, the mayor appointed James H. Ingersoll, Michael Norton, Thomas Coonan and John J. Welsh, the commissioners, who continued in office and served as such until some time after 1872. By section 7 of the act, chapter 583 of the Laws of 1871, the sum of $750,000 was appropriated for the completion of the "New York county court-house," to be expended under the direction and supervision of the court-house commissioners, and the comptroller was commanded, on the requisition of the commissioners, to pay over to their credit such sum or sums as they might from time to time deem necessary for such purpose; and the comptroller was authorized and directed to raise the amount appropriated on the stock of the county of New York. In the same act it was provided that no bonds or stocks of the city or county of New York, except those authorized to be issued by the direction of the commissioners of the sinking fund and revenue bonds issued in anticipation of the taxes of the current year, should be thereafter issued except by the concurrence and authority of all the persons composing the board of apportionment, consisting of the mayor,

comptroller, the commissioner of public works, and the president of the department of parks, who should be present at a meeting called by the chairman of the board for that purpose on three days' notice.

From the review of the statutes it is clear that the court-house was a county building, built for county purposes, at the county expense, upon county real estate actually purchased of the city, and that when built it belonged to the county. The commissioners appointed to build it were county commissioners engaged in disbursing county moneys and discharging functions devolved upon them as county officials or agents.

It matters not that they were appointed by the mayor of the city. It was for the Legislature to determine how they should be appointed. It could have named them in some act or could have devolved their appointment upon the board of supervisors, or the sheriff, or some other local officer. Their character as county commissioners depended not upon the source of their appointment, but upon the nature of their duties and powers, and of the work they were required to perform. That they were county commissioners had been several times decided by the courts in New York in unreported decisions, and the following cases tend strongly to the same conclusion: *People* v. *Stout*, 23 Barb. 349; *Wood* v. *Mayor*, 7 Hun, 164; *People, ex rel. Lyon*, v. *Civil Service Board*, 41 id. 287; *Erghott* v. *Mayor*, 96 N. Y. 264; 48 Am. Rep. 622; *Walsh* v. *Mayor*, 107 N. Y. 220.

It is conceded, and was so found by the trial judge, that the commissioners had no power or authority to borrow any money on behalf or on the credit of the county, and that they did not and could not bind the county for the advances made to them by the defendant, and if there had been no further legislation than that already referred to, the city, succeeding to the liabilities of the county, would have been under no legal liability to the defendant for the claim made by it.

It is important before going further to inquire whether the defendant made these advances in good faith, and to answer this inquiry a few facts must be stated. After the commissioners were appointed, Ingersoll was chosen their treasurer, and he was

such from the date of his appointment until some time subsequent to December 31, 1872. The bank received formal written notice of his appointment as treasurer, and that his would be the only signature in dealings of the commissioners with the bank. In the month of April, 1871, Ingersoll, as treasurer, applied to the defendant to make advances to and for the use of the commissioners, and to act as a bank of deposit for them, and it agreed to do so. Before however it made such agreement, its president called upon both the comptroller and the mayor of the city, and they each informed him that it was proper, safe and right for him to take the account of the commissioners and make the advances. Thereafter, before the 2d day of September, 1871, the defendant advanced and paid to and for the use of the commissioners, upon checks drawn upon it by Ingersoll as treasurer and indorsed by the payees therein named, the sum of $442,579.97. The only money deposited to the credit of the commissioners was the sum of $200,000, deposited by the comptroller on the 7th day of July, 1871, in compliance with a requisition made by the commissioners upon him, and out of an appropriation authorized by the board of apportionment.

All the checks were drawn to pay bills and expenses ostensibly made by the commissioners in the construction of the court-house, and all the money drawn upon the checks was actually applied to pay such bills and expenses, except the sum of $45,000; and that was fraudulently misappropriated under the following circumstances; a fraudulent conspiracy had been entered into by Ingersoll, William M. Tweed, Richard B. Connolly, then the comptroller, and others, by which certain of the bills were to be raised forty per cent above their true amount and this excess was to be divided between the conspirators for their own private use. This conspiracy was unknown to the other commissioners, and there is no proof that it was known to the mayor of the city. All the dealings of the bank with Ingersoll as treasurer were conducted through its president, Wm. M. Bliss, and he was the sole agent and representative of the bank. There was nothing in the form of the checks drawn by Ingersoll to give him any notice of the conspiracy or fraud, and he had no knowledge whatever of the misappropriation of any of the money drawn. There was no

proof whatever that he acted in bad faith in making the advances upon the checks. He ought to have known that the commissioners had no authority to take these advances upon the credit of the county. But the knowledge which the law imputes to him of their want of authority has no bearing whatever upon the question of his good faith. He used due diligence. He consulted the comptroller and the mayor, who was also a lawyer, and was assured that the arrangement which the commissioners proposed to make with him was right and proper, and it was not an unusual arrangement, as the city banks were much in the custom of advancing moneys to the various departments and commissionérs of the city in anticipation of appropriations to be made.

But it is claimed that knowledge of the conspiracy and fraud must be imputed to the bank, because three of the conspirators, Ingersoll, Tweed and Connolly, were directors of the bank, and hence that the bank could not claim the benefit of good faith. But none of these directors represented the bank in these transactions and in no way acted for the bank in them Connolly was consulted as comptroller, and Ingersoll acted for the commissioners. Neither of them was present at any meeting of the directors when any action was taken in reference to the advances. The sole agent and representative of the bank was Bliss, its president, and he was entirely innocent of any wrong. The knowledge these conspirators had while engaged in their fraud for their own benefit could not therefore be attributed to the bank; and to this effect are all the decisions. *Bank of U. S.* v. *Davis*, 2 Hill, 451; *President, etc.* v. *Cornen*, 37 N. Y. 320; *Holden* v. *N. Y. & Erie Bank*, 72 id. 291; *Atlantic Bank* v. *Savery*, 82 id. 291; *Craige* v. *Hadley*, 99 id. 131; *Custer* v. *Tompkins Co. Bank*, 9 Penn. St. 27; *President, etc.* v. *Lewis*, 22 Pick. 24; *Farmers & Citizens' Bank* v. *Payne*, 25 Conn. 444.

The question now remains whether these advances made by the defendant were subsequently ratified by competent legislative action. Before September, 1871, the appropriations made for the various city departments and commissions had been exhausted, and in that month and October and November of the same years certain banks, trust companies and insurance companies advanced to the comptroller of the city or the departments and

commissions large sums of money for the purpose of paying the expenditures of such departments and commissions during those months and the month of December, and they took as security for the moneys so advanced assignments of the claims to pay which the moneys were borrowed. Those moneys were advanced without authority of law to meet an emergency with the expectation that subsequent legislative action would ratify them. On the 30th day of January, 1872, in section 2 of the act, chapter 9 of the laws of that year, it was provided that the comptroller, out of the proceeds of bonds authorized to be issued by that act, should be authorized and required to pay back to the "various banks, insurance and trust companies of the city of New York all moneys which have been advanced by said banks, insurance and trust companies, or any of them, prior to the 31st day of December, 1871, to or for the use of any of the departments or commissions of the city or county of New York." These advances made by the defendant are plainly embraced within the language of this act. They were advances made by a city bank to and for the use of county commissioners. The claim for these advances was before the passage of the act as well known to the comptroller as the claims of the other corporations which had advanced moneys. We may assume that the act was drawn under the supervision, or at the instigation, of the comptroller, the financial officer of the city and county, and if it had not been intended to provide for these advances the language would have been such as to include them. It appears, too, that the court-house commissioners were the only county commissioners, strictly speaking, to which the act could apply, and there was no other claim for advances made to the county presented under the act. It is true that these advances were illegal and so were all the other advances referred to.

These advances were made in good faith and all the moneys advanced were used for the county, except the sum of $45,000, fraudulently diverted by the conspirators. The fact that the conspirators were among the directors of the bank did not deprive its innocent directors, stockholders and creditors of all claim to just consideration and did not make it an outlaw without rights, a *caput lupinum*, entitled to no protection.

While the Legislature may not always be held to have had full knowledge of all the facts and consequences involved in its action, its ignorance cannot be presumed for the purpose of nullifying the plain meaning of its language. But we have no right to assume that if the Legislature had known the precise facts as they now appear in this record, it would have refused to ratify a claim for moneys thus advanced in accordance with a common practice, in good faith, a small portion of which only was misappropriated by the trusted agents of the county. As the plain language embraces these advances, they should not by construction be taken out of the statute, except we can clearly perceive a legislative intention that they should not be embraced; and that upon a consideration of all the facts we are unable to perceive.

It is further claimed that the Legislature was not competent to ratify these advances and make them a binding obligation on the county. It is said that it could not originally have authorized advances to be made to the conspirators for fraudulent division among themselves, and that hence it could not ratify such advances. This may be conceded. But here, these advances were made in good faith, not to be divided among the conspirators, but to and for the use of the county. This the Legislature could have authorized, and the county would have been bound, although the conspirators had misappropriated all the money, and what it could originally have authorized, it could ratify and confirm. Municipal corporations are creatures of the State and exist and act in subordination to its sovereign power. The Legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed, and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on. The provisions of this act are sanctioned by the principles of the following decisions: *Town of Guilford* v. *Supervisors*, 13 N. Y. 143; *Brewster* v. *City of Syracuse*, 19 id. 416; *Darlington* v. *Mayor*, 31 id. 164; *Brown* v. *Mayor*, 63 id. 239.

We therefore conclude that judgment allowing defendant's counter-claim was right and should be affirmed.

All concur.

THOMPSON v. ST. NICHOLAS NATIONAL BANK.*

(113 N. Y. 325.)

Negotiable instruments — pledge — application of payment — certification of checks.

Where the holder of bonds payable to bearer transfers them to stock-brokers, to hold as margins on his individual stock transactions, and the brokers pledge them to a bank in the regular course of business, as security for current indebtedness, the bank acquires a valid title to them, and the owner cannot recover them, except by paying the amount for which they are pledged.

Certain bonds were deposited by brokers with a bank, on the credit of which the bank, on the same day, certified and paid the broker's checks for a large amount. The brokers made cash deposits with the bank on the same day. On the morning of that day the brokers were indebted to the bank on a running account, which also the bonds were pledged to secure, but the securities were at all times insufficient to cover the entire indebtedness. *Held*, that in the absence of any express application of the cash deposits by the parties, the law applies them to the earliest items of the account, in preference to the indebtedness incurred by payment of the certified checks.

A National bank agreed to honor a depositor's checks in consideration of collaterals, and subsequently certified such checks for the benefit of anticipated holders; *held*, that the validity of the debt created by paying the checks is not affected by U. S. R. S., § 5208, declaring it unlawful for National banks to certify any check unless the drawer have the amount thereof on deposit.

APPEAL from judgment of Supreme Court, General Term, First Department, in favor of defendant.

Replevin to recover ninety-three bonds of $1,000 each, by executors of John B. Thompson.

Lewis Sanders, for appellants.

Wm. Allen Butler, for respondent.

RUGER, C. J. The uncontroverted proof on the trial established the following facts, viz.: That on the 18th day of April, 1874, Capron & Merriam, stock-brokers in New York, deposited

*Affirming 47 Hun, 631.

with the defendant, a National bank, ninety-three coupon railroad bonds, payable to bearer, of the par value of $1,000 each, as security for any indebtedness which they then were or might become liable for to such bank, with authority to sell such securities, either at public or private sale, without advertisement or notice, and apply the proceeds in payment of such indebtedness. Upon the same day, and upon the faith of such deposit, the defendant promised to pay Capron & Merriam's checks in favor of third parties, to the amount of upwards of $236,000, and simultaneously certified checks to that amount, which were presented by and paid to the holders thereof during the same day. On Monday, the 20th of April, 1874, Capron & Merriam failed, owing the defendant a balance of account of about $72,000, arising out of the transactions of the 18th day of April, 1874. This sum was made up by charging Capron & Merriam with the amount of the checks certified and paid on the 18th of April, certain other checks, paid through the clearing-house on the morning of that day, and a balance of account remaining unpaid upon the transactions of the preceding day, and deducting therefrom the amount of their deposits, being about $211,000, made on April 18. On the 5th day of May, 1874, the plaintiffs' testator served a written notice upon the defendant to the effect that the bonds in question were his property, and forbidding them from parting with the same, except by his order, and demanding an account showing what lien the defendant claimed to have on the bonds.

Upon the trial the plaintiffs proved that their testator, previous to April 18, 1874, owned such bonds, and on that day, and the day previous, transferred them to Capron & Merriam, to be held as margins on his individual stock transactions. No payment upon the indebtedness of Capron & Merriam to the defendant was ever made, except some small sums received by way of interest, and the receipts from sales of the bonds in question and others held as security for it. Such receipts never amounted to the sum of the indebtedness. No offer to pay such indebtedness was ever made by the plaintiffs' testator, or request to redeem the bonds in suit, or admission of any right in the bonds by the defendant. The defendant never, in terms, refused to render an

account of its transactions with Capron & Merriam to the plaintiffs' testator, but it did omit to send a written statement thereof in response to his notice requiring the same. The defendant subsequently sold all of the securities held by it, either at public or private sale, using its best efforts to obtain as large a price as possible for them, and realized less than the amount of the debt due to it from Capron & Merriam. The plaintiffs' testator in October, 1879, claiming to be the owner of the bonds, demanded of the defendant their unconditional delivery to him; and in April, 1880, brought this action to recover their possession. Each party, on the close of the evidence, requested the direction by the court of a verdict, and the court granted the request of the defendant, and ordered a verdict for it. To this direction the plaintiffs excepted.

The plaintiffs also asked to go to the jury, in case the court should refuse to direct a verdict for them upon certain grounds stated, upon the fact whether the defendant was not liable for the full value of forty-eight certain bonds "which they sold without notice to plaintiffs' intestate, and he is entitled to have applied on the bank's account the highest market price which they would realize in extinguishment of the bank's claim, leaving the rest of the securities free and clear." This was refused, and the plaintiffs excepted. The court ordered the exceptions to be heard in the first instance at the General Term.

There were some exceptions to the admission or rejection of evidence by the court taken by the plaintiffs during the trial, but none are referred to in the appellants' brief on the argument before us, and they were all unimportant. Neither has the exception to the refusal of the court to permit the plaintiffs to go to the jury on the alleged question of fact been argued or presented on the appeal. The refusal of the court was so obviously proper that it is unnecessary to spend time in discussing it.

It thus appears that the only exception in the case is to the direction of the court requiring the jury to find for the defendant. This exception presents the question whether, upon all of the facts of the case, the plaintiffs had established a right to demand the surrender of such bonds, or any part thereof, by the defendant to them. We think there was no error in the disposi-

tion made of the case by the trial court. The complaint alleges the ownership of the bonds by the plaintiff; that on or about the 18th day of April, 1874, the defendant became wrongfully and illegally possessed of the same; that upon demand it had refused to deliver them up to plaintiff; and a demand of judgment for the return of the bonds, and in case that could not be had, a judgment for their value. The answer denied all of the allegations of the complaint except its own incorporation, and a demand of the bonds by the plaintiff, and for a second defense alleged the transfer of said bonds to it by Capron & Merriam as security for certain loans and demands made to and for said Capron & Merriam, the non-payment of the debt for which they were pledged, and a sale of such securities pursuant to the agreement under which they were pledged.

The issue in the case was thus a plain one. The plaintiff claimed to be the absolute owner of the bonds, unaffected by any right which the defendant might assert in respect to them; and to maintain the action he was bound to show that no title passed to the defendant by their transfer, or that at some time prior to the commencement of the action he had become entitled to the possession of such bonds, or some part thereof. *Duncan* v. *Brennan*, 83 N. Y. 487; *Clements* v. *Yturria*, 81 id. 285; *Redman* v. *Hendricks*, 1 Sandf. 32; *Ingraham* v. *Hammond*, 1 Hill, 353; *Pattison* v. *Adams*, 7 id. 126; 42 Am. Dec. 59.

Assuming the validity of the transaction by which the defendant became possessed of the bonds, this could be effected only by proof that the debt for which they were pledged had been wholly paid or the tender of a sufficient sum to discharge such debt. *Lewis* v. *Mott*, 36 N. Y. 395; *Bakeman* v. *Pooler*, 15 Wend. 637; *Talty* v. *Trust Co.*, 93 U. S. 321.

This, confessedly, the plaintiff did not show. Various alleged equitable claims have been presented by the appellants as affecting the determination of this appeal; but, admitting their existence, the form of the action does not permit their consideration here. The action was replevin *in cepit*, and predicated upon the alleged wrongful taking by the defendant of the bonds in question from Capron & Merriam. The application of the deposits of the 18th day of April to the extinguishment of the unpaid

balance of account existing against Capron & Merriam on the morning of that day, instead of the indebtedness created by the payment of the certified checks, was properly made, and could not be questioned by the plaintiff. The demand upon which they were applied was a running account, composed of a number of items accruing at different times, all equally secured by the collaterals held by the defendant, but which were always insufficient to discharge the whole debt. Under such circumstances, in the absence of any express application of payments by the parties, the law applies them to the earliest items of the account. *Truscott* v. *King*, 6 N. Y. 147; *Harding* v. *Tifft*, 75 id. 461; *Webb* v. *Dickinson*, 11 Wend. 62; *U. S.* v. *Kirkpatrick*, 9 Wheat. 720; Munger Paym. 102.

The main contention of the appellants is that the transaction by which the defendant certified checks for Capron & Merriam, without having an equivalent amount of money on deposit to meet them, was a violation of section 5208 of the United States Revised Statutes, and that no valid debt against Capron & Merriam was created thereby; or, in other words, that the defendant did not become a *bona fide* holder of such bonds by reason of payments made in pursuance of such alleged illegal and prohibited arrangement. The statute is as follows:

"It shall be unlawful for any officer, clerk or agent of any National banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association, but the act of any officer, clerk or agent of any association in violation of this section shall subject such bank to the liabilities and proceedings on the part of the comptroller, as provided for in section fifty-two hundred and thirty-four."

It will be seen that the statute affirms the legality of the contract of certification, and expressly prescribes the consequences which shall follow its violation. It therefore appears that so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined, and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision

that no other consequences are intended to follow a violation of the statute. It would indeed defeat the very policy of an act intended to promote the security and strength of the National banking system if its provisions should be so construed as to inflict a loss upon them, and a consequent impairment of their financial responsibility.

The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the National Banking Act. *Bank* v. *Stewart*, 107 U. S. 676; *ante* 96; 2 Sup. Ct. Rep. 778; *Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank. Cas. 12; *Bank* v. *Whitney*, 103 U. S. 99; *ante* 5. The principle decided in *Bank* v. *Stewart* seems to be in point. There the bank made a loan upon the security of shares of its own stock, which loan was prohibited by section 5201 of the United States Revised Statutes. After the debt became due the bank sold the shares and applied their proceeds to the payment of the debt. The administrators of the debtor sued to recover the proceeds of the sale, and it was held that they could not recover, as the contract had been executed.

In *Bank* v. *Matthews* the court held that a mortgage on real estate, taken to secure an existing indebtedness and for future advances, was a valid security in the hands of the bank, although by sections 5136 and 5137 of the Revised Statutes of the United States it was impliedly prohibited from taking such securities. It was held that the government alone was entitled to prosecute for the offense committed by the bank in taking a prohibited security, Justice SWAYNE saying: "The impending danger of a judgment of ouster and dissolution was we think the check, and none other, contemplated by Congress." The same principle was held by this court in *Bank* v. *Savery*, 82 N. Y. 291.

But we are further of the opinion that the section has no application to the question here, which concerns the relations between Capron & Merriam and the defendant alone. By the deposit in question, Capron & Merriam secured the promise of the bank to protect their checks of a certain day for a specified amount. The certification of these checks was entirely aside from this agreement. That was a contract between the bank and the anticipated holders of the checks. Capron & Merriam had received the con-

sideration for their pledge when the bank agreed with them to honor their checks. This would have been equally effectual between these parties without any certification. That act was simply a promise to such persons as might receive the checks that they should be paid on presentation to the bank, in accordance with the previous agreement with Capron & Merriam. The legal effect of the agreement was that the bank should loan a certain amount to Capron & Merriam, and would pay it out on their checks to the persons holding them. It was entirely lawful for the bank to contract to pay Capron & Merriam's checks, and it did not affect the legality of that transaction that they also represented to third parties that they had made such an agreement and would pay such checks. Capron & Merriam cannot dispute their liability for the amount paid out in pursuance of such an agreement, and neither can any other party standing in the shoes of the bank depositor. The fact that the bank, in connection with an agreement to pay such checks, had also promised third parties to pay them, could not invalidate the liability previously incurred, or impair the security which had previously been given to it upon a valid consideration. The fact of the certification was entirely immaterial in respect to the liability incurred by Capron & Merriam to the bank.

We have been unable to discover any evidence in the case impairing the title to the bonds acquired by the bank through their transfer by Capron & Merriam to it. The purpose for which they were transferred by Thompson contemplated their possible and probable transfer and sale by Capron & Merriam, and the bank acquired a valid title to them by such transfer. The evidence showed that the transaction between Capron & Merriam and the bank was in the ordinary course of business pursued by the bank, and that it received the bonds in good faith for a valuable consideration. Within all the authorities, this gave it good title to such securities. *Welch* v. *Sage*, 47 N. Y. 143; 7 Am. Rep. 423; *Murray* v. *Lardner*, 2 Wall. 110; *Machine Co.* v. *Best*, 105 N. Y. 59.

The bank having acquired a valid title to the bonds, was authorized to deal with them for the purpose of effecting the object for which they were transferred by Capron & Merriam. *Talty*

v. *Trust Co.*, 93 U. S. 321. Its right to hold the bonds continued so long as any part of the debt against Capron & Merriam remained unpaid. The plaintiffs' intestate could undoubtedly at any time have established his equitable right to a return of the bonds, and procured their surrender, by paying the amount for which they were pledged; but this he not only refrained from doing, but impliedly denied any right in the defendant, by demanding the unconditional surrender of the bonds. This he never became entitled to, and of course is not authorized to recover their possession in this action.

The judgment should be affirmed, with costs.

All concur.

People's Bank of the City of New York v. Mechanics' National Bank of Newark.

(62 How. Pr. 423.)

Jurisdiction — attachment.

A receiver of a National bank situated in another State, though not a party, may move to vacate an attachment.

In an action against a National bank of another State, an attachment issued against its property in this State will be vacated upon proof of its insolvency.

Gray & Davenport, for plaintiff.

Martin & Smith, for defendants.

Lawrence, J. It was held by the Court of Appeals, in the case of *Robinson* v. *National Bank of Newberne*, 81 N. Y. 385; 59 How. Pr. 218; 2 Nat. Bank Cas. 309, that the Supreme Court of this State has jurisdiction of an action *ex contractu*, brought by a citizen of this State against a National bank located in another State, and that the provisions of the National Banking Act (U. S. R. S., § 5242), prohibiting the issuing of an attachment, injunction or execution against such an association or its property, before final judgment, applies only to an association which has become insol-

vent, or to one about to become so, as specified in the preceding part of the section. In that case the cases of *Central National Bank* v. *Richland National Bank*, 52 How. Pr. 136, 137, and of *Rhoner* v. *First National Bank*, 14 Hun, 126, were cited upon the brief of the appellant's counsel, and must have been considered by the court, and in so far as those cases lay down a doctrine which differs from that enunciated in *Robinson* v. *First National Bank of Newberne*, they must yield to the latter case. In this case it is sought to sustain the jurisdiction of the court and to bring the case within the doctrine of *Robinson* v. *National Bank of Newberne*, *supra*, by denying the insolvency of the defendant, and it is claimed that the question should be disposed of by a reference. I regard it as a sufficient answer to this point to say that the affidavits submitted on the part of the plaintiffs do not meet or overcome, in my judgment, the very positive proofs of the insolvency of the defendant, which are presented on behalf of the receiver, and therefore a reference is unnecessary. It is further urged that as the receiver appears only specially for the purposes of this motion, and has not submitted himself generally to the jurisdiction of the court, his application ought not to be entertained. But this position cannot be maintained. Under the old Code it was held that a subsequent attaching creditor could not move to set aside a prior attachment. See § 241 of the Code of Procedure; *Ketchum* v. *Ketchum*, 1 Abb. Pr. (N. S.) 157.

But under section 682 of the Code of Civil Procedure:

"The defendant, or a person who has acquired a lien upon, or interest in his property, after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security, given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative."

The receiver of the defendant in this case certainly brings himself within the language of this section. He has acquired "a lien upon or interest in the defendant's property," since the attachment was issued. There is nothing in the section which requires the applicant to become a party to the action. And it is every-day practice to allow such motions to be made without imposing upon the applicant the condition that he shall ask to be made a party to the action in which the attachment was granted. Furthermore, it

is quite apparent that this section was intended to put subsequent creditors or parties subsequently acquiring a lien upon or interest on the defendant's property upon the same footing as that occupied by the defendant under the old Code. See Mr. Throop's note to § 682 of the Code of Civil Procedure.

And under the old Code it was held that the defendant was entitled to make a motion to set aside the attachment without putting in a general appearance in the action. *Manice* v. *Gould*, 1 Abb. Pr. (N. S.) 255. The cases of *Tracy* v. *First Nat. Bank of Selma*, 37 N. Y. 524, and *Allen* v. *Scandinavian Nat. Bank*, 46 How. Pr. 71, were decided prior to the passage of the Code of Civil Procedure, and therefore have no bearing on this case. I am therefore of the opinion that the motion to vacate the attachment should be granted, but under the circumstances, without costs.

Market National Bank of New York v. Pacific National Bank of Boston.

(30 Hun, 50.)

Insolvency — act of — attachment.

The defendant, a National bank at Boston, Mass., on November 18, 1881, closed its doors, and was put in charge of a government bank examiner, and thus continued till March 14, 1882, when the Comptroller allowed it to resume. It transacted business till May 22, 1882, when it was placed in the hands of a receiver. An attachment was issued in this action, Nov. 19, 1881, against defendant's property in this State. At that time its assets would have paid its debts and liabilities exclusive of its capital, but it had refused to pay various legal obligations then due. *Held*, that defendant had committed acts of insolvency, within U. S. R. S., § 5242, and the attachment should be vacated.

APPEAL from an order of the Special Term denying a motion to vacate an attachment.

Willard Bartlett, for appellant.

Abraham Wakeman, for respondent.

DANIELS, J. The attachment was issued upon the ground that the defendant was a banking corporation formed and existing in the State of Massachusetts. Its credit in the State of New York was attached by means of an attachment and finally applied by an execution to the payment of the judgment. This payment was made on the 3d day of October, 1882, while the appeal was not taken from the order until the 2d of November, 1882. For that reason a motion was made with the argument of the appeal itself, to dismiss the appeal.

But by section 682 of the Code of Civil Procedure, a motion to vacate an attachment may be made at any time before the actual application of the attached property, or the proceeds thereof, to the payment of the judgment recovered in the action.

The motion itself to vacate the attachment was made and decided before this application of the attached property to the payment of the judgment. It was accordingly within the time for that purpose prescribed by this section of the Code, and having been decided adversely to the defendant, the absolute right was given to it of appealing from the order, and that appeal has not been subjected to the contingency that the judgment should not in the meantime be paid by the appropriation of the attached property. It was sufficient that the motion was made within the time for that purpose allowed. And having been so made, the defendant was authorized afterward to prosecute its appeal from the order. The appeal cannot be dismissed, but must under these circumstances be disposed of upon its merits. The application to discharge the attachment was made upon the ground that the defendant being a National banking association, formed under the laws of Congress, was not liable to be proceeded against in that manner, after it had committed an act of insolvency. And in support of the motion it was claimed that acts of this nature had been committed by the defendant before the attachment itself was issued. The action was brought to recover the amount of five certificates of deposit, upon which the sum of $24,390 appeared to be due and payable. This attachment was issued and served on the 19th of November, 1881. The day before its service the doors of the bank had been closed, and it had been placed in the possession of an examiner, under the authority of the bank

department of the United States, and it so continued until the 14th of March, 1882, when, by the permission of the Comptroller of the Currency, it was allowed to resume its business, and after that it continued in the management and transaction of its affairs until the 22d of May, when it was finally found incapable of proceeding with its business, and was placed in the hands of a receiver. By the affidavits, reports and statements produced and read upon the hearing of the motion, the assets of the bank appear to have been sufficient to pay its debts and liabilities, excluding its capital stock, amounting to the sum of $961,370. This was the probable state of its affairs at the time when the attachment was issued, and in a general sense, without reference to the state of its capital, it may be said to have been solvent; that is, by a proper management and disposition of its property the debts and liabilities existing against it might be paid. But this ability, by careful management, to pay its indebtedness is not what the statute required to protect the corporation against the charge of having committed an act of insolvency, and by reason of such act to be exonerated from the seizure of its property by attachment. For the statute has provided upon the commission of an act of insolvency, or in contemplation thereof, that all transfers or assignments of its property, or securities, or demands, made by it with a view to prevent the application of its assets, as that has been directed by law, or to give a preference to one creditor over another, except in payment of its circulating notes, shall be void, and that no attachment, injunction or execution shall be issued against such association or its property before final judgment. U. S. R. S., § 5242.

The object of this section was to prevent any creditor from acquiring a preference over the other creditors of the association, either by the voluntary act of the association or the instrumentality of legal process of the description of that now in controversy, after any act of insolvency shall be committed. Its purpose was to promote equality among the creditors of the association, and that is not permitted to be evaded or prevented by the attachment of its property. The proper construction of this section was considered in *Robinson* v. *Nat. Bank of Newberne*, 81 N. Y. 385, and 19 Hun, 477.

And by that construction an attachment against the property of the association can only be maintained where it shall be issued previous to the commission of any act of insolvency, or contemplated insolvency, on the part of the association. As to what the act may be which will place the case within the operation and effect of this section it has not in terms been declared, but the phraseology made use of is not uncommon in statutes of this nature. And such a construction has ordinarily been given to it as to render the act containing it applicable to corporations or associations still having ability by the careful appropriation of their assets to pay their debts. Such ability is not sufficient to prevent the application of the section. Even though the debts may be paid out of its assets, still it may commit an act of insolvency within the obvious intent of the language of this section. A provision of the Bankrupt Law not as specific or pointed in its enactment as this section, was considered in the case of *Toof* v. *Martin*, 13 Wall. 40, and it was held that the term "insolvency" is not always used in the same sense.

It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning; but it is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and as applied to them it is the sense intended by the act of Congress. *Toof* v. *Martin*, 13 Wall. 47. And the same construction was given to another section of the statute quite similar in its import in *Rasin* v. *Ammidown*, 15 Hun, 422, where it was said that "insolvency when used in this statute in reference to traders means inability to pay debts as they fall due in the ordinary course of business. Id. 426.

The section of the statute applicable to the present case is more explicit in its provisions than either of those upon which these decisions were made. And it was probably made so because of the necessity for strict legislation concerning the business and operations of the financial associations of the country. For that reason the commission of any act of insolvency, or any act in contemplation thereof, is all that has been required to prevent a

banking association from making a transfer of its property, or payment of its money to secure a preference of one creditor over the others. And to permit the same, under the seizure of its property by means of an attachment, was also in like manner prohibited. The act of insolvency, upon which the effect of the other provisions of the section was made dependent, under these authorities must be held to be any act proceeding from the inability of the association to pay its debts in the ordinary course of its business. Scrupulous punctuality is required to be observed in the financial management of these associations. Their efficiency and usefulness require them to be prepared on all occasions to meet their just and unquestioned obligations. and when they fail to do that in consequence of the want of funds, that is an act of insolvency within this section of the statute. Section 12 of the act of June 22, 1874 (chap. 390), enacted for the purpose of amending the Bankrupt Law, has been brought to the attention of the court, but it justifies no different considerations of the obligations of banking associations. That has provided for the defaults upon which proceedings in bankruptcy might be instituted, and it in no manner modified or qualified the section of the Revised Statutes to which reference has already been made. It provided for an altogether different proceeding upon facts not included within the provisions of this section, and it can have no effect upon the disposition which should be made of this appeal. Under this construction of the statute it becomes a question of fact to be determined upon the affidavits and papers produced upon the hearing of the motion whether this act of insolvency was committed by this association.

It is stated in general terms in the affidavit of Daniel Needham, that "on the 18th day of November, 1881, the defendant committed divers acts of insolvency, to-wit: The refusal and failure by said defendant to pay, upon due demand, divers legal debts and obligations then due and owing by defendant to divers persons and corporations." This statement was neither denied nor qualified in any form by either of the other affidavits in the case. But by the sworn complaint in this action its correctness is confirmed by the statement that on the 19th day of November, 1881, the certificates of deposit held by the plaintiff were "duly

presented for payment to the defendant, and payment thereof refused by the defendant." These facts, as they are set forth in the affidavit, may safely be accepted as a truthful relation of the acts of the defendant preceding the service of this attachment. And they, together with the fact that the association had closed its doors and was placed in possession of an examiner, were evidence of its inability to pay its legal obligations in the ordinary course of its business. *Brown* v. *Montgomery*, 20 N. Y. 287.

And such failure proceeding from this inability was an act of insolvency within the reasonable signification of this section of the statute. Further proof of the accuracy of the statement made in this affidavit is supplied by the report of the attorney, W. J. Best, who states that at the time when the bank suspended it had less than $13,000 in cash, and the report of the examiner incorporated in the case confirms the truth of this statement. That reported the financial condition of the association on the 18th of November, 1881. In that report the bills of other banks held by this association was stated to be the sum of $9,694, and its gold treasury notes at the sum of $3,049.68, making its total cash on hand to be the amount of $12,743.68, which was very little in excess of one-half of that which was due to the plaintiff upon its certificates of deposit. These figures fully sustain the report of the attorney, and prove beyond controversy that at the time when the association failed to pay the certificates of deposit held by the plaintiff, the failure proceeded from its financial inability to meet the demands made upon it in the course of its business. And that failure, together with the closing of the doors of the bank, within the language of this section, was an act of insolvency. And by the effect to be given to that act, it prevented the seizure of the defendant's property by the attachment issued in favor of the plaintiff.

The resumption of the business of the bank under the authority of the Comptroller of the Currency, in the following month of March, in no manner tended to support the right of the plaintiff to the attachment. For the facts upon which that was permitted did not conflict with the evidence showing the commission of these acts of insolvency on the part of the association. At the time when the business was allowed to be resumed, over

$1,000,000 of its indebtedness had been paid off, and about $500,000 owing to the bank had been secured by mortgages, stocks and bonds, which had been brought into it by the debtors as collateral, and instead of having less than $13,000 in cash on hand, as was the fact when the act of insolvency was committed, its cash had been increased to nearly $1,000,000, and was still steadily increasing.

It was because of these favorable changes in the condition of the affairs of the bank, and not for the reason that it had committed no act of insolvency, that this resumption in its business was allowed to take place. It was entirely consistent with these facts that the acts of insolvency alleged in support of the motion had taken place before the attachment was issued.

Neither the delay in finally bringing on the motion, nor the change in the property of the defendant, justified the order from which the appeal had been taken. As a matter of fact a prior motion was made to set aside the attachment which resulted in an order to that effect, but as it was finally entered, it was reversed and the motion denied on appeal to the General Term, but without prejudice to the motion which was made for the same purpose in the summer of 1882. For most of the time since the attachment was served proceedings have been pending to vacate it, because the association was not liable to be proceeded against in that manner, for the reason that it had previously committed the alleged act of insolvency. Besides that the section of the Code declaring the time within which such a motion may be made was applicable to the case when the hearing occurred resulting in the order. It was at that time both authorized and regular. And as the attachment was issued in contravention of the prohibition of the section of the Revised Statutes of the United States which has been referred to, it should have been successful, and the attachment itself then set aside. If the plaintiff's position had been prejudiced in the collection of its debts, that has been done by its own act, the consequence of which it has no right to require should be transferred to the defendant.

The order should be reversed, but without costs, and an order entered setting aside the attachment.

Brady, J., concurred.

Order reversed and order entered setting aside attachment.

Craigie v. Smith.

(14 Abb. N. C. 409.)

Fraud — insolvency — rescission.

Where one deposits a draft with a National bank, and the bank sends it to an agent for collection, who collects it, and the bank fails before receiving the avails, having been insolvent at the time of the deposit, the depositor may rescind the transaction for fraud and recover the avails from the agent.

ACTION against Brown Brothers & Co. to recover proceeds of drafts, drawn by plaintiffs on the New York, Lake Erie and Western Railroad Company, to the order of Lee, president of First National Bank of Buffalo, and intrusted to said bank for collection, April 13, 1883, half an hour before the close of bank hours, and credited to them on their pass-book. The bank on the same day sent them for collection to Brown Brothers & Co. At three P. M. of the same day, the bank closed its doors and never re-opened. Brown Brothers & Co. collected the drafts and held the proceeds; subsequently paid the money into court, and defendant, as receiver of the bank, was substituted. The referee found that the bank had been for some time before April 13, 1883, hopelessly insolvent, to the knowledge of all its officers. Judgment for plaintiffs.

Richard Crowley (*Crowley & Laughlin*, attorneys), for appellant.

John G. Milburn (*Rogers, Locke & Milburn*, attorneys), for respondents.

Beckwith, J. When the plaintiffs deposited their draft with the First National Bank it was upon a contract implied from the circumstances, custom and course of dealing, to this effect, namely, that the plaintiffs transferred the drafts upon the promise of the bank that it would honor the checks of the plaintiffs whenever in business hours presented, to the extent of the sum deposited. The promise was a sufficient consideration moving from the bank, and gave it ownership of the drafts.

The finding of the referee that the bank acquired the draft by fraud is sufficiently supported by the evidence. On April 13, in the forenoon, Lee, the president, then in New York, found out, if he did not know it before, that the bank could not go on. He telegraphed his cashier not to make drafts but did not countermand his previous order to keep open the bank. Although the fraudulent practices charged were those of the president of the bank, nevertheless, under the decisions in this State, it would seem they are imputable to the bank.

Whether as a matter of law the fraud of its agent is, strictly speaking, chargeable to the bank or not it is permissible so to regard it and plead it for the sake of the remedy by action, for it comes to the same thing when a party seeks to recover from a corporation property obtained by fraud, whether the fraud was that of an agent or his principal. The party's right is to recover to the extent which the corporation has received.

The plaintiffs, when they deposited the drafts, transferred title to the bank. This question is, whether the transfer is revocable. Generally, contracts obtained by fraud are voidable at the election of the party deceived. The abstract right is however sometimes defeated and from various circumstances, as for example, the delay of the party injured, his inability to restore what he obtained on the contract, or because other persons have innocently acquired interests that depend on the contract. But here, no circumstances have been proved that can take away the plaintiffs' right to rescind. The plaintiffs moved promptly to recover their drafts; they had received neither bill, certified check, nor any thing else on the credit of the deposit, and had nothing for which substantial restitution was to be made to the bank, as a preliminary to their action; nor, as I think, had any other person acquired any interest under the contract, or in the drafts or the deposit, that should prevent rescission. The plaintiffs were able to follow, identify and recover the drafts or proceeds, separate from other funds of the bank, and free from specific claims of individuals. The plaintiffs deposited the drafts on April 13, about half an hour before the bank finally closed its doors. On April 14 the bank remained closed, and its actual condition was that of such utter insolvency that from that time it existed for purposes

only of liquidation. And here the defendant makes the important objection to the plaintiffs' recovery that the rights of all parties upon the insolvency of the bank became fixed; that the law under which the bank had existence forbids every kind of preference, and that consequently the plaintiffs must be left to share equally with the other creditors. U. S. R. S., § 5242. It is unquestionably the policy of the National Banking Law, since all the creditors cannot be paid in full, to preserve the entire assets of an insolvent bank for equitable distribution, and this policy would itself have the force of law sufficient to enable and require the courts to declare against any transaction or proceeding that tends to defeat the object of the statute, although it may not violate the letter. The Banking Law however does not declare that all property in possession of the defaulting bank shall be kept for distribution, but that the assets belonging to the bank shall be so preserved. It is urged by the defendant that if the respondents can succeed upon the ground of fraud, then the other creditors who placed sums of money with the bank after acts of insolvency can also recover their deposits. Other customers doubtless made deposits on the same day, some of paper and some of money, and it would appear to be no greater hardship for the plaintiffs to contribute to the general loss than for them.

The question however is not one as to hardships, but the question is, whether there exists any reason why a person who deposits in a National bank that is at the time insolvent, and who had been induced to place his money there by a fraudulent holding out of the bank by its officers as sound, may not rescind. Is there any thing in the policy of the laws of Congress, or in the nature and constitution of the bank, and the relations of customers who mutually contribute to sustain the business of the bank, that prevents a rescission by a customer for fraud? Many persons may make the bank their common depository, and do that in view of the law that in case of insolvency all deposits shall be kept for ratable division, and that every creditor is to contribute to the loss in proportion to his claim, still can it be said that each customer acquires an interest in the deposits of the others, or that their deposits are made upon an implied contract for mutual benefit in case of the failure of the bank?

I do not think such an interest or agreement among the customers results from their mutual dealings with the bank, or that because they are deemed to know the legal constitution of the bank and the policy of the law in relation to insolvency, that they can be held to have waived their right to impeach a contract for fraud. It would be an unsafe rule that should declare the frauds of a bank beyond remedy, because it has become insolvent. The argument that the plaintiffs cannot maintain their action, for the reason that if they can, the sequence would be that every customer who deposited money after acts of insolvency could likewise recover is not I think a valid one, and the fault in the argument consists in its being assumed that depositors of money could not recover, for the like fraud. It might happen, and probably would happen in ninety cases out of a hundred, that circumstances would arise that would prevent a rescission by the depositor. His cash may have become mixed with the common fund, or partly or wholly appropriated, or diverted so as not to be distinguishable. As a general statement it may be true, when a deposit either of drafts or money is made and credit entered in favor of the depositor, that in legal view the deposit is merged in the general funds of the bank. Ordinarily, I suppose that to be the legal result, that is, the result where the transaction is not voidable. The proposition however is but the expression of the legal doctrine that excludes the idea that the depositor keeps any interest in the specific subject of the deposit after the bank has received it. Still I believe the law refrains from laying down a rule that makes the condition of a person dealing with a National bank different from what it is when dealing with natural persons, so far as concerns his right to rescind a contract for fraud. If he can rescind, — that is, if the circumstances of fact exist which the law ordinarily recognizes as necessary to the exercise of that right — he may rescind even as against an insolvent National bank. If he has not received any thing which can be restored to the bank only by his act — if, in fact, the deposit remains distinctly separate from the general funds, if it has not been subsequently incumbered or affected by the transactions of the bank, and no circumstances of the kind that ordinarily prevent rescission have intervened — then his remedy remains.

The conclusion reached therefore is that the judgment entered on the report of the referee in favor of the plaintiffs should be affirmed.

FARMERS AND MECHANICS' NATIONAL BANK OF BUFFALO v. ROGERS.

(Buff. Super. Ct., June 29, 1889.)

Pleading — complaint — cause of action — corporation — location — right of action — uniting legal and equitable causes of actions.

The complaint alleged that the plaintiff is a corporation organized under the National Banking Act of the United States; that defendant made his promissory note for $5,000, payable to the plaintiff, at said bank, for value received, with interest, and containing an agreement which recites that the defendant "having deposited with the bank, as collateral security," a certain certificate of stock "giving the plaintiff full power in case of default in the payment of the note at maturity, to sell the stock at private or public sale, and apply the proceeds to the payment of the note;" that the note was not paid at maturity, and that the stock has not been sold or the lien foreclosed, and demands judgment for $5,000, and that the lien upon the stock be foreclosed, etc. *Held*, that the complaint alleges a good cause of action.

The complaint alleged that the plaintiff had done business in Buffalo, N. Y., upward of ten years, and the name "Farmers and Mechanics' National Bank of Buffalo," is recited in the complaint. *Held*, that there was sufficient to fix the location at Buffalo, N. Y., under Code Civ. Pro., § 1775.

Although the plaintiff had the right under the agreement to sell the stock without action, he may come into court and ask its direction.

Under Code Civ. Pro., § 484, such as were formerly denominated legal or equitable, or both, may be joined in the same complaint.

Lewis & Mott, for plaintiff.

L. F. & G. W. Bowen, for defendant.

TITUS, J. The defendant sets up as grounds of demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action; that it does not allege whether the plaintiff is a domestic or foreign corporation, as required by section 1775 of the Code, and that two inconsistent causes of action are improperly joined.

The complaint contains a general allegation, that the plaintiff is a corporation, organized under the National Banking Act of the United States. That the defendant made his promissory note for $5,000, payable to the plaintiff, at said bank, for value received with interest. Following the note and on the same paper on which it is written, is an agreement which recites, that the defendant "having deposited with the bank as collateral security, certificate No. 256, for one hundred shares of capital stock of the New York Steam Company, giving the plaintiff full power in case of default in the payment of the note at maturity, to sell the stock at private or public sale, and apply the proceeds to the payment of the note." The complaint further alleges, that the note was not paid at maturity, and that the stock has not been sold, or the lien foreclosed, and demands judgment for $5,000, and that the lien upon the stock be foreclosed, and that the plaintiff have such other relief as may be proper.

The complaint alleges a good cause of action, and the court could grant such relief on the trial as the evidence would warrant. There is no ambiguity in the language used, or uncertainty, as to what the cause of action is. The substance of the allegations are the making of the note by the defendant, and turning over stock to the plaintiff as collateral security for its payment, and the non-payment of the note when it became due, to-wit, with a prayer for relief that the stock be sold and the proceeds applied in payment of the judgment establishing the amount due on the note.

From the fact that the plaintiff had the right, under the agreement, to sell the stock without action, it does not follow that he cannot come into court and ask its direction to the matter. This is the more usual, and it seems to me the proper practice in cases of this kind, and it does not seem necessary to cite authorities in support of it.

It is claimed that two causes of action, one legal and the other equitable, have been improperly joined; one being an action at law on the note and the other for the foreclosure of a lien, and for specific relief. The distinction between legal and equitable actions was long ago abolished, and the plaintiff may now, under the Code, unite in the same complaint two or more causes of ac

tion, whether or not they are such as were formerly denominated legal or equitable, or both. Code, § 484.

Although calling for a different manner of trial, they may still be joined in the same complaint. *Lattin* v. *McCarty*, 41 N. Y. 107; *Sternberger* v. *McGovern*, 56 id. 12.

The cases cited by the defendant in his brief are when one cause of action arose on contract, and the other in which the gist of the action is the wrongful act of the defendant, and are not an authority on the question raised here.

The fact that the complaint fixes no value to the stock is not material. The gist of the action is the promissory note of $5,000, and whether the stock held by the plaintiff as collateral security for the payment of the note is adequate for that purpose, cannot affect the plaintiff's right to have the amount of the note determined by the judgment of the court, and the proceeds of the stock applied in the payment thereof. The plaintiff might properly have been more specific in the statement of his cause of action, but the fact that it has not furnishes no grounds of demurrer so long as a cause of action is stated. A demurrer to a complaint for insufficiency can only be sustained when it appears, that admitting all of the facts alleged, it presents no cause of action whatever; and it is not a ground of demurrer that the facts are imperfectly or informally alleged. *Marie* v. *Garrison*, 83 N. Y. 14.

In the particular referred to by the defendant as a ground for demurrer but one cause of action is alleged, and therefore in that particular the complaint is clearly sufficient.

The other question presented, that the complaint does not state whether the plaintiff is a domestic or a foreign corporation, is more serious.

Section 1775 provides that in an action brought by or against a corporation:

> "The complaint must aver that the plaintiff or defendant, as the case may be, is a corporation; must state whether it is a domestic or foreign corporation, and if the latter, the State, country or government by or under whose laws it was created."

The complaint does state that it is a corporation duly organized under the National Banking Act of the United States, but it does

not in so many words state where the bank is located and doing business, nor that it is either a domestic or foreign corporation.

Section 3343 of the Code defines what is a domestic and what a foreign corporation. A domestic corporation is declared to be a corporation created by or under the laws of the State, or located in the State and created by or under the laws of the United States. If the complaint can be construed as alleging that the plaintiff is located at the city of Buffalo, then I do not think it would be necessary to characterize it domestic or foreign, as does section 3343 of the Code, but the court may say after the facts mentioned by the statute are alleged, that it is either a domestic or foreign corporation. This portion of the section is not found in the former Code, nor in the Revised Statutes, and the courts have had but little occasion to pass upon it. I am not aware that the Court of Appeals has passed on the point here considered. Such decisions as have been rendered are not entirely harmonious, but the weight of authority seems to be that it is necessary to comply with the requirements of the Code, and allege whether the corporation is one classed as domestic or foreign.

In *Hafner* v. *Grumme*, 10 Civ. Pro. 176, the question was considered by the Special Term in this department, and Justice BRADLEY held that where the complaint alleged that the plaintiff was a duly organized corporation, but omitted to relate whether it was a domestic or foreign corporation, it was not a ground of demurrer; that the complaint stated a complete cause of action, which was not dependent on the fact whether the corporation was domestic or foreign; and overruled the demurrer.

In *First National Bank of Northampton* v. *Doying*, 13 Daly, 509; 1 N. Y. State Rep. 617, the General Term of the Court of Common Pleas held that where the complaint alleged that the plaintiff was a "National banking association incorporated and doing business under and by virtue of an act entitled An act to provide a National currency," but contained no allegation as to whether it was a domestic or foreign corporation, or where located, the omission was a fatal defect, and was properly raised on demurrer.

Lee v. *La Compagnie Universelle*, 2 N. Y. State Rep. 612, was an appeal from an order denying a motion to vacate an

attachment. The General Term of the First Department held that the complaint must comply with section 1775 of the Code, and allege the character of the corporation.

In *Baker* v. *Star Printing Co.*, Judge DALY, at Special Term of the Common Pleas, held that it was a necessary allegation in the complaint, and sustained the demurrer. 3 Law Bull. 29.

In *Clegg* v. *Cramer*, 3 How. Pr. (N. S.) 128, the Special Term of the Supreme Court held that although the complaint contained the allegation that the defendant corporation was a foreign corporation, just as it did not state under the laws of what State it was created, as required by section 1775 of the Code, it was bad on demurrer. These later cases seem to contain no expressions of doubt on the question, and they must be regarded as the mere authoritative statement of the requirements under this section of the Code, and that the complaint must contain an averment either express, or such a statement of facts, as that the court can determine whether the law has been complied with in this respect. The allegation in the complaint in effect is that the plaintiff corporation was organized under the laws of the United States. If it had in terms stated that it was located at Buffalo, N. Y., no question could be raised, and the requirements of the statute would be satisfied. It does aver however that the plaintiff has done business in Buffalo, N. Y., upwards of ten years. The name of the plaintiff is "Farmers and Mechanics' National Bank of Buffalo," which is recited in the complaint, and to a certain extent, indicates its location, and this taken with the fact that it has been doing business in Buffalo upwards of ten years, is sufficient, it seems to us, to fix the location at Buffalo, N. Y., and to warrant the court in holding that the complaint does in substance comply with section 1775 of the Code in that respect.

The demurrer must therefore be overruled, with leave to the defendant to answer.

All concur.

NOTE.—In First Nat. Bank of Northampton v. Doying, cited above, the court said: "The court below held that inasmuch as it was alleged in the complaint that the plaintiff was incorporated under the act of Congress, it was from the very nature of its incorporation a foreign corporation, and that where this was a self-evident fact it added no force to the pleading to allege that it was a foreign corporation.

"The difficulty with this position is that section 3343, subdivision 18 of the Code, says: A 'domestic corporation' is a 'corporation created by or under the laws of the State,

or located in the State and created by or under the laws of the United States. * * * Every other corporation is a foreign corporation.'

"Therefore a National bank is either a foreign or domestic corporation, according to its location, within or without this State, and as this is not specifically stated, the complaint is defective in that particular, and this defect can be taken advantage of by demurrer. Baker v. Star Printing and Publishing Co., 3 Law Bull. 29; Clegg v. Kramer, 3 How. (N. S.) 130; First Nat. Bank of Northampton v. Doying, decided at the March General Term of this court, 1886."

OLDHAM v. BANK.

(85 N. C. 240.)

Mortgage — ultra vires — mistake — correction — nudum pactum. Usury — set-off.

A National bank may purchase a note in favor of a third party, and thereby acquire a collateral mortgage on land, and the claim may be incorporated with other indebtedness to the bank, and a new mortgage on land taken by the bank to secure the whole sum.

Where by the mistake or oversight of the makers of a deed it is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under Bat. Rev., chap. 35, § 26; and a promise by the grantee to make such correction at his own expense and trouble would be *nudum pactum*.

Usurious interest previously received by a National bank in the course of renewals of a series of notes, terminating in one upon which suit is brought, cannot be pleaded by way of set-off or payment, but the only remedy is a separate action for double the interest paid by him.

ACTION tried at June term, 1881, of New Hanover Superior Court, before GRAVES, J., to restrain defendants from selling real estate, situate in the city of Wilmington, the property of the plaintiff Alexander Oldham, under two mortgages executed by the plaintiffs on the 5th day of September, 1878, the one to secure a debt to the defendant bank for $10,999.67, and the other to the defendant Burruss for $3,880.

In their complaint the plaintiffs set out eight distinct causes of action against the defendants, who demurred to the third, sixth, seventh and eighth causes, and answered as to the others.

The issues of law alone were tried, and the court sustained the demurrer as to the third, sixth and seventh causes of action, but

allowed the plaintiffs to amend as to the seventh, and overruled it as to the eighth. Appeals were taken by both plaintiffs and defendants, but were argued and considered together.

McRae & Strange and *D. J. Devane*, for plaintiffs.

E. S. Martin, for defendants.

RUFFIN, J. We will consider the several grounds of demurrer in the order mentioned, and as the questions involved are purely matters of law depending upon the pleadings, it will be necessary to set them out with some particularity.

The plaintiffs allege as constituting their third cause of action, that the indebtedness of $10,999.67, alleged to be secured in the mortgage to the defendant bank, was made up of three items of alleged previous indebtedness, on the part of the plaintiff, Alexander, to the said bank: (*a*) a debt due the same for the sum of $3,800 evidenced by his note given to it on the 17th day of March, 1877; (*b*) an apparent indebtedness to the defendant Burruss for $6,200 evidenced by a note dated the 17th March, 1877, and given to said Burruss by name, but really in secret trust for the bank and for moneys lent by it, and that it was so taken in order to conceal the true nature of a mortgage which the plaintiffs then gave to defendant Burruss to secure the same, and to evade the act of Congress which prohibits National banks to take such securities except for antecedent debts; (*c*) the sum of $1,199.67, which, as was alleged, the said Alexander had overdrawn on his deposit account; that these three items being added on the 5th of September, 1878, made the sum for which the mortgage was given, and thereafter it bore a rate of interest different from that which had previously been paid on the several items of which it was composed, and therefore the plaintiffs insist that it became (and especially that part of it which consisted of the debt taken from the defendant Burruss), a cotemporaneous claim, and within the prohibition of the act of Congress.

Taking the statements of the complaint to be true, it is impossible, we conceive, that the mortgage in question can be obnoxious to the objection urged against it.

Two of the items which went to make up the sum secured thereby are admitted to have previously existed as debts due the bank, and as to the third, to-wit, the $6,200 debt taken in the name of Burruss, it is immaterial whether it was so or not. If as alleged, the entire consideration of the original debt secured in the mortgage of the 17th of March, 1877, proceeded from the bank, and the defendant Burruss acted throughout the transaction as its agent (though secretly), then from its very inception it was the claim of the bank. And while if the act of Congress referred to should receive the construction insisted on by the plaintiffs, the security taken might have been assailed on some other grounds, it cannot be so on that assumed in the complaint. So on the other hand, if that debt were really what it purported to be, due to Burruss individually, there was no reason why the bank might not have purchased it at the moment of taking the new security.

In the case of *Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12, it was expressly ruled that the purchase by an institution of a like character with the defendant bank, of a note secured in a mortgage, whereby it got the full benefit of the mortgage, was not within the purview of the statute. But apart from all that, the same court, in the same case, decided that a mortgage taken to secure a debt then newly created, or even future advances, was not void, since the act did not say so in terms, but was silent as to that, and the courts were always reluctant to the last degree to declare a forfeiture, and that the only objection to such a mortgage, which will be heard, must come from the government of the United States. So too in the case of *National Bank* v. *Whitney*, 103 U. S. 99; *ante* 5, so late as last year, that court made a similar decision, citing and approving the case of *Bank* v. *Matthews*, *supra*.

As their sixth cause of action the plaintiffs allege that the defendant Burruss not being satisfied with the mortgage given him on the 17th of March, 1877, to secure the debt of $6,200, demanded of the plaintiffs that they should execute another to him for that purpose, and accordingly they did so on the 28th day of the same month, but either by mistake or design the said defendant caused it to be so written as to make it appear to be an additional indebtedness of $6,200, whereas it was only an additional

security for the same indebtedness, and upon the same being called to his attention, he promised to rectify the error on the register's books of the county, but has since failed and refused to do so, though often requested, to the damage of the plaintiff Alexander $10,000.

There seem to be several defects in this demand of the plaintiffs. In the first place, as stated, it is impossible for the court to see that any damage could have been the necessary consequence of the defendant's neglect in the particular complained of, and in the next place, if any mistake was made it was that of the plaintiffs themselves and in their own deed, so that the duty of correction rested as much upon them as upon the defendants, and the means of effecting it was entirely within their power. The statute (Bat. Rev., chap. 35, § 26) provides a remedy for every person in the registration of whose deed a mistake may be made, and if notwithstanding this the plaintiffs submitted to loss and inconvenience without any effort to relieve themselves, the consequences of their failure cannot be thrown upon others. In addition to this there was no consideration, moral or otherwise, for the promise of the defendant upon which the plaintiffs rely. The true test of a consideration, said this court in the case of *Fulke* v. *Fulke*, 7 Jones, 497, is to be found in the inquiry—was there any benefit to the party promising, or any loss or inconvenience to the other party, at the time the promise was made? and admitting that a high sense of moral obligation might have prompted the defendants to make the correction when informed of the mistake, there was still no such legal duty resting upon them as a court could enforce. *Hatchell* v. *Odom*, 2 Dev. & Bat. 302.

For their seventh cause of action the plaintiffs say, that the note and mortgage for $10,999.67 given to the defendants, on the 5th day of September, 1878, were continuing parts of previous usurious agreements and transactions between the plaintiff Alexander and the defendant, directly and indirectly through its agent Burruss, under which there had been reserved and secured to the bank various illegal rates of interest, ranging from twelve to twenty-four per cent per annum, and that the sum of $2,785.96 had been actually received by said bank in the way of such

usurious interest. And they insist therefore that the mortgage is invalid by reason of such illegal consideration, but whether so or not they say that the said sum of $2,785.96 is a payment of so much of the principal of the debt, and that they are entitled to a credit therefor.

The result of the decisions both of this and the Supreme Court of the United States is that no State law upon the subject of usury can be made to apply to National banks, and that the only law which touches them in this respect is the provisions of the statute under which they are organized. The construction given to those provisions too, by that court, must be respected and accepted by every other tribunal, seeing that it is the court of last resort whose jurisdiction extends to the subject. And it is well perhaps, however some of its determinations may differ from preconceived opinions, that we have a court whose judgments in such matters can have universal prevalence.

Institutions of this sort now pervade the whole country, and have become its great money-agents to the exclusion of almost all other agencies, so that it is a matter of infinite consequence that their powers and duties should be uniformly interpreted and enforced.

In the very recent case of *Barnett* v. *Bank*, 98 U. S. 555; 2 Nat. Bank Cas. 18, it was held by a unanimous court, that usurious interest previously received by a National bank in the course of renewals of a series of bills terminating in the one then in suit could not be pleaded by way of a set-off or payment to the bill, and that the only remedy the party aggrieved can have is that afforded by the National Currency Act of Congress, which act allows nothing in the way of such relief beyond a simple action of debt for twice the amount of interest paid, and that this relief could not be associated in the same action with other grounds of relief, but must be sought in an action brought solely and exclusively for that purpose, in which the single issue as to the guilt or innocence of the bank can be presented without the presence of any extraneous facts which might disturb the minds of the jury.

Influenced by this decision, as we feel ourselves to be, the Supreme Court of Pennsylvania in the case of *Bank* v. *Dushane* (not yet reported at length but briefed in Albany Law Journal,

March 12, 1880), made a similar ruling by which it overruled many of its previous adjudications.

As we read the decision, it goes to the full length of saying that in an action brought by a National bank the plea of usurious interest paid, whatever be its form, can avail nothing, and that no action for a like cause, of whatever nature, lies against such an institution save the one given in terms by the statute.

This being so, the demurrer was properly sustained in the court below, as to the plaintiff's seventh cause of action in its original shape, and we cannot see that they are at all relieved by the amendment which they were allowed to make.

The interdiction of the statute as construed applies to their action in its present shape with as much force as ever. The action for money had and received on account of excess of interest paid does not lie against the defendant bank, however it may lie against other defendants, for the reason that it is not the remedy given in the statute and no other can avail.

Treating the order of amendment as equivalent to a judgment overruling the demurrer to the complaint in its new form, we think his honor erred.

In their eight cause of action the plaintiffs seek to recover of the defendant bank the sum of $5,571.92, that being twice the amount of the usurious interest alleged to have been paid by the plaintiff Alexander in the transactions out of which the action grew.

This, as we have just seen, they are not at liberty to do, except by an action brought solely and exclusively for that purpose, and much less are they permitted to have any standing in a court of equity until they have waived their right to the penalty imposed by the act of Congress. A failure to remit such a penalty was held to be a good ground for demurrer to a bill seeking the aid of a court of equity in the case of *Branson* v. *Dixon*, 1 Mur. 225. But it may be doubted whether it is so under the Code which undertakes to say of what the causes for a demurrer shall consist. It is not necessary in this case that we should consider that question, or the further question, whether a court of equity would not of its own motoin withhold its aid in such a case, as the plaintiffs' action must fail for the reasons first given.

The judgment of the court below sustaining the demurrer as to the third and sixth causes of action is affirmed, and the judgment overruling the demurrer as to the seventh and eighth causes of action is reversed, and as to them also the demurrer is sustained.

Let this be certified to the Superior Court of New Hanover county, where the action is pending.

Error. Demurrer sustained.

McAden v. Commissioners of Mecklenburg County.

(97 N. C. 355.)

Taxation — stock.

The Revenue Act of North Carolina (Act 1885, chap. 177, § 12) enumerates what shall be deemed "solvent credits," and provides that the party taxed "may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor." *Held*, that the holder of stock of a National bank located in said State was entitled to deduct his indebtedness from the valuation of his shares of said stock, although National bank stock was not included in the statute enumeration of "solvent credits."

APPEAL from Mecklenburg county.

W. P. Bynum, for plaintiff.

Burwell & Walker, for defendants.

Smith, C. J. The plaintiff on the 1st day of June, 1886, being the owner of two hundred shares of the capital stock in the Merchants and Farmers' National Bank, and of one hundred and thirty-two shares in the First National Bank of Charlotte, both organized and operating under the act of Congress for the formation of National banking associations, at Charlotte, rendered during that month a list of his taxable property, in which one hundred shares of such stock were given in at the par value of $100 per share.

The shares were assessed by the commissioners at $85 per share; and the plaintiff charged with all the stock at an aggregate value of $28,220, and the list thus reformed delivered to the sheriff for collection. The plaintiff reduced this estimated value by deducting his alleged indebtedness of $18,220, claiming the right to do so, to the sum stated in the list. The sheriff, acting under the directions of the Legislature of the State in reference to the raising of revenue, refused to make any abatement, and was proceeding to enforce payment, when, in an order made in the present action against the county commissioners, they were restrained, he having paid the entire tax against him upon the basis of the deduction claimed, and as set out in the rendered list.

The defendants demurred to the complaint, assigning as grounds therefor:

"(1) That it appears by the said complaint that the shares of stock of the two National banks owned by the plaintiff were not, when listed for taxation, subject to deduction for debts owing by him, and there are no facts stated or alleged in the complaint from which it appears the plaintiff's said shares of stock are exempt from taxation, or have been improperly and unlawfully listed for taxation by the defendant commissioners. (2) That it appears from the complaint that by the laws of this State the defendant commissioners are fully authorized and required to list the said shares of stock for taxation in the manner in which they have listed them, as set forth in the complaint, and that the taxes imposed upon the same are due and owing by the plaintiff, and that the defendant sheriff has the lawful power and authority to collect the same, as other taxes are collected. (3) That it appears from the said complaint the said commissioners have acted in strict conformity with the statutes of this State in listing said shares of stock for taxation, and it does not appear that the Congress of the United States has enacted any legislation which protects the said shares of stock, or the plaintiff as the owner thereof, from the full operations of said statutes; nor is there any law of Congress that restricts or limits the power of this State to tax shares of stock of National banks, so as to deprive it of the power exercised in this particular case."

Judgment of Judge MONTGOMERY: "This case coming on to be heard upon demurrer filed by the defendants, and the same being

argued by counsel of the parties, and considered by the court, the court doth overrule the demurrer filed, and give leave to the defendants to file an answer to the complaint. It is further adjudged that the restraining order heretofore granted be continued to the hearing." From this judgment the defendants appeal. The Revenue Act of 1885 (chap. 177, § 12), in its enumeration of taxable property, contains this clause, numbered 5:

"The amount of solvent credits, including accrued interest uncollected, owing to the party, whether in or out of the State, whether owing by mortgage, bond, note, bill of exchange, certificate, check, open account, and due and payable, or whether owing by any State or government, county, city, town or township, individual, company or corporation. Any certificate of deposit in any bank, whether in or out of the State, and the value of cotton, tobacco or other property in the hands of commission merchants or agents, in or out of the State, shall be deemed solvent credits within the meaning of this act. If any credit be not regarded as entirely solvent, it shall be given at its true current or market value. The party may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor."

Not only are stocks not included in the credits as defined in the clause, but some forms of visible property — crops in the hands of agents — are included in the term.

The act of Congress, without the authority of which no taxation upon the shares of these National banking associations could be imposed, confers the power upon the States within whose limits they are located, with the restriction

"That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." U. S. R. S., § 5219.

The term "moneyed capital" has been construed to embrace investments in banking associations, as well as credits in a more strict sense; and hence that an act denying deductions for indebtedness of the share-owner from the value of his stock, when it is allowed to creditors who owe, is in violation of the permitting act of Congress, and is void as to shareholders who are indebted, and have not such property as the deductions are allowed to be made from. The discrimination against such shares is wholly unauthorized.

In *Hepburn* v. *School Directors*, 23 Wall. 480; 1 Nat. Bank Cas. 113, Chief Justice WAITE says: "We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are, 'other moneyed capital.' That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term."

In *Adams* v. *Nashville*, 95 U. S. 19; 1 Nat. Bank Cas. 148, Mr. Justice HUNT, after remarking that the act did not mean to interfere with exemptions from taxation of homesteads and other property for meritorious considerations by a State, adds: "The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discriminations of the States, in the exercise of their taxing powers."

In *People* v. *Weaver*, 100 U. S. 539; 2 Nat. Bank Cas. 57, an act of New York was declared null, in that it refused to the plaintiff the same deduction, for debts due by him, from the valuation of his shares of National bank stock, that it allows to those who have moneyed capital otherwise invested, etc.

So, it has been held that while the statute of the State requires all moneyed capital, including National bank shares, to be assessed at its true cash value, the systematic and intentional under-valuation of all other moneyed capital, and of shares in National banks at their full value, is a violation of the act of Congress. *Pelton* v. *National Bank*, 101 U. S. 143; 2 Nat. Bank Cas. 85; *Cummings* v. *National Bank*, 101 U. S. 153; 2 Nat. Bank Cas. 74.

The subject was more elaborately examined in *Hills* v. *Exchange Bank*, 105 U. S. 319; *ante* 45, on appeal from the Circuit Court of the United States for the Northern District of New York. The suit was brought by the bank, suing in right of and as representing the stockholders, to prevent the enforcement of the tax imposed by the State upon National bank shares, on the ground that no provision was made "for deduction from the assessed value of these shares of the debts honestly owing by the shareholders." The Circuit Court declared the enactment void, and while this ruling was reversed, it was declared that the shareholder had a right to have his own indebtedness taken from the valuation of his shares.

It was again considered in *Evansville Bank* v. *Britton*, 105 U. S. 322; *ante* 48, in which the opinion of the majority of the court is delivered by Mr. Justice MILLER. He reiterates the proposition "that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress." The statute referred to, somewhat like our own, and less obnoxious to the objection, allowed the tax payer's debts to reduce his (1) credits or money at interest, either within or without the State, at par value; and (2) all other demands against persons or bodies corporate, either within or without this State. Three of the court dissented, the chief justice and Mr. Justice GRAY being of opinion that the deductions allowed of one indebtedness from another indebtedness was not within the purview of the enactment, and was not a prohibited discrimination; while Mr. Justice BRADLEY held the whole provision for taxing National bank shares inoperative, whether the owner owed debts to be deducted or not. The State statute was held by the court to be void only as it interfered with the right of one, in debt, to have his valuation of stock diminished thereby, when subjected to taxation.

These cases settle the question of construction, and we abide by the rulings in them. There is no error, and this will be certified to the court below.

BANK v. ZENT.

(39 Ohio St. 105.)

Deposit — special — liability for — negligence — evidence — demand.

National banks may accept special deposits.

Where a National bank has been accustomed to receive United States bonds as special deposits gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value.

A demand of said bonds, and a refusal by the bank to deliver the same, with no other explanation of such refusal than the statement that the bank has no such bonds in its possession, furnish sufficient proof of loss by such negligence as will render the bank liable therefor.

ERROR to the District Court of Richland county. Action in the Court of Common Pleas of Richland county, to recover the value of United States bonds deposited with the First National Bank of Mansfield. Judgment in favor of the present defendants in error affirmed by the District Court. The facts are stated in the opinion.

Tenner & Tracy and *H. C. Hedges*, for plaintiff in error.

Dirlam & Leyman, for defendants in error.

UPSON, J. In behalf of the plaintiffs in error it is insisted, that whatever contract or arrangement existed, was between the defendants in error and W. S. Hickox individually, and not as an officer of the bank, and that if he did attempt to bind the bank, without the knowledge of the directors, the agreement wan *ultra vires* and absolutely void. Upon a careful examination of the testimony, all of which is set forth in the bill of exceptions, we are of opinion that it fully warranted the Court of Common Pleas in finding that the bonds described in the petition were received by the bank as a special deposit for safe-keeping; that with the full knowledge and acquiescence of its directors and officers, the bank engaged in the business of receiving United States bonds on deposit for safe-keeping, and that Hickox, as cashier, had general authority to receive such special deposits for the bank. We do not think the right of the defendants to recover the value of the bonds depends upon proof that special authority was given to the cashier in this particular instance.

The testimony shows that some of the bonds were actually sold, and the proceeds converted to the use of the bank, and it might well have been regarded as proved, that all of the bonds in this case have been thus converted, but we decide this case upon grounds common to all of the cases submitted with this.

The first question of law presented by the record is, had the cashier power to bind the bank by receiving the bonds as a special

deposit for safe-keeping? In the case of *Wiley* v. *First National Bank of Brattleboro*, 47 Vt. 546; 1 Nat. Bank Cas. 905, the Supreme Court of Vermont decided that the taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of National banks, and that their cashiers have no power to bind them on any express contract accompanying, or any implied contract arising out of such taking. In a number of other cases decided by State courts, it was also held that National banks were not responsible for the safe-keeping of special deposits intrusted to their care, even when such deposits were made with the knowledge and acquiescence of the directors, and that the banks could not be held liable even for the gross negligence of their officers. These decisions rest upon the assumption that the act under which National banks are organized expressly sets forth the powers conferred upon those banks, and does not include among them power to receive special deposits, and that such power is not given them by the grant of all such incidental powers as shall be necessary to carry on the business of banking. The proper construction of the Banking Act has however since this action was brought, been conclusively determined by the Supreme Court of the United States, in the case of *First Nat. Bank of Carlisle* v. *Graham*, 100 U. S. 699; 2 Nat. Bank Cas. 64, in which that court decided not only that if a bank be accustomed to take such deposits as the one in question, and this is known and acquiesced in by the directors, it is liable to the same extent as if the deposits had been authorized by the terms of the charter, but also decided that the provision of the law authorizing a bank after its failure "to deliver special deposits," clearly implied that it might, as a part of its legitimate business, receive such special deposits. In the case now under consideration, it was proved to have been a part of the ordinary business of the bank to receive United States bonds for safe-keeping, and it follows that the cashier in dealing with the defendants in error acted within the scope of his authority as cashier, and that the bank was therefore bound by his acts.

The degree of care required of the bank depends upon the nature of the bailment. There is strong proof that the bonds were taken not merely for the accommodation of the owners, but for

the benefit and profit of the bank. It may be conceded however, for the purpose of this decision, that no advantage or compensation was to be received by the bank for the responsibility which it incurred. It is usually stated that a bailee who is to receive no reward is liable only for gross negligence, and some of the cases hold that such a bailee is responsible only for the want of that care which is taken by the most inattentive. But that rule cannot be applied to all cases of bailment without reward; for when securities are deposited with persons accustomed to receive such deposits, they are liable for any loss occurring through the want of that care which good business men would exercise in regard to property of such value. This was the degree of care required of the bank in this case. Were the bonds lost for the want of such care? They were demanded by the defendants in error, and the only excuse given for not delivering them, as stated in the answer, was that "the said bank not having any such bonds in its possession did not deliver any to the plaintiffs." No explanation was offered and no reason given for the bonds not being in the possession of the bank. We hold that under these circumstances, the proof of demand, and the refusal to deliver, was sufficient evidence that the bonds had been lost by the gross negligence of the bank, if not converted to its own use.

Judgment affirmed.

CLEVELAND v. SHOEMAN.

(40 Ohio St. 176.)

Party — bank as pledgee of warehouse receipt in replevin. Warehouse receipt — power to lend on security of.

A National bank having made a loan on the security of a warehouse receipt for merchandise, is a proper party defendant to a suit in replevin by the consignor and owner of the merchandise against the warehouse keeper.

A National bank has power to lend money upon the note or other personal obligation of the borrower secured by the pledge of a warehouse receipt for merchandise as collateral security.

A factor holding a warehouse receipt for the delivery of merchandise consigned to him by the owner to sell on commission, in order to obtain a loan from a

bank, gave to the bank his negotiable promissory note, and as collateral security therefor (and not to secure any antecedent debt or demand), duly transferred and delivered to the bank the warehouse receipt, and made an agreement with the bank for the disposition of the merchandise.

Held, that under the act of March 12, 1844 (1 S. & C. 420), if the bank in good faith loaned the money, and took the warehouse receipt, and made said agreement, upon the faith that the factor was the true owner of the merchandise, such transfer and agreement were valid, and the bank was entitled to hold the merchandise as security for the payment of the note.

ERROR to the District Court of Cuyahoga county. Samuel Shoeman and Samuel Cove, defendants in error, sent S. F. Lester, a merchant in Cleveland, Ohio, one hundred barrels of flour to be sold on commission and the proceeds to be sent to the defendants in error.

On June 9, 1874, Lester placed the flour in the warehouse of Cleveland, Brown & Co., and received from them a warehouse receipt in his own name.

On the same day he obtained from the First National Bank of Cleveland, Ohio, a loan of $600, and executed to the bank his promissory note for that amount, the note stating that he pledged said receipt as security, and he then declaring that he owned the flour and the receipt being attached to the note.

On July 3, 1874, this action of replevin was brought by the defendants in error, in the Court of Common Pleas of Cuyahoga county, by which fifty barrels of said flour were delivered by the sheriff to the defendants in error. The bank, on the application of Cleveland, Brown & Co., was made party defendant.

Upon the trial the plaintiffs asked the court to charge the jury "that a National bank cannot lawfully take personal property as security for a loan of money. A warehouse receipt delivered, delivers possession of the property, and this transaction was the taking by the bank of personal property as a security for a loan, and is void." Refused. Exception. Plaintiff further requested the court to charge the jury as follows: "If the bank defendant did not know, but by reasonable inquiry could have ascertained that this flour was held by Lester to be sold on commission, but did not make such inquiry, that the plaintiff is entitled to recover." Refused, except with the following qualifications: "But if the officer or officers of the bank at the time the money was loaned

and the warehouse receipt taken as security therefor were informed by Lester that he was the owner of the flour, and the bank relied upon such information and loaned the money on the faith of that security, the bank would not be bound to make further inquiry as to the ownership of the flour." Exception. Plaintiff requested the court to charge the jury as follows: "If the jury find that plaintiffs put the fifty barrels of flour in question into the hands of Lester to sell on commission as a factor or agent of plaintiff, and the plaintiffs were the owners of said flour at the time of the transfer of the warehouse receipt and property to the defendant bank, said Lester had no rightful authority to transfer said warehouse receipt and said flour to the defendant bank as collateral security to secure a loan to himself, nor had the bank, the defendant, any rightful authority to receive and hold said flour for such purposes, and said transaction respecting said flour is void as to the plaintiffs and they are entitled to recover." Refused. Exception. The court charged the jury that if the bank in good faith loaned Lester the money and took the flour, believing in good faith it was Lester's, it was valid, to which the plaintiff excepted.

Verdict against the defendants and judgment therein. On plaintiff's petition in error in the District Court the judgment of the Common Pleas was reversed.

Petition in error in this court to reverse the judgment of the District Court and affirm that of the Court of Common Pleas.

C. C. Baldwin and *L. W. Ford*, for plaintiff in error.

L. R. Critchfield, for defendant in error.

DICKMAN, J. There was no error in making the bank a party defendant to this action in the court below. The bank claimed an interest in the controversy adverse to the plaintiffs. The question involved was the right of the plaintiffs to the possession of the property replevied, and the bank claiming to be the pledgee of the warehouse receipt and the property it represented as collateral security for the payment of Lester's note, became a necessary party to a complete determination of the question involved. Code, § 35.

It is contended by the defendants in error, that under the seventh clause of section 5136, U. S. R. S., a National bank has no power to loan money upon a note secured by the pledge of a warehouse receipt for merchandise as collateral security. By the said section, every National banking association is authorized "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

A warehouse receipt, like a bill of lading, is a symbol of the property designated in it, and stands in the place of the property it represents. The question therefore arises, whether the bank transcended its power in taking the warehouse receipt as collateral security for the note of Lester. The section of the statute under consideration contains several distinct and independent grants of power — neither grant being a limitation on any other — and describes the kind of banking in which National banking associations are authorized to engage. To render these grants effective, such associations are authorized to exercise such incidental powers as shall be necessary to carry on the kind of banking permitted. A National bank therefore, empowered to carry on the business of banking "by loaning money on personal security," may also exercise all powers incidental thereto. Vested with such authority, we do not think that in making a loan on the personal obligation of the borrower with a warehouse receipt as collateral security thereto, the bank exceeds its statutory powers. It is not to be limited in taking security for discounts and loans, to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, stock of a corporation, bills of lading, and other personal chattels. The language "personal security" would seem to refer to other personal security than is mentioned in the first grant of power in section 5136 — authorizing the business of banking "by discounting and negotiating

promissory notes," etc. DILLON, J., in *Pittsburgh Car Works* v. *State National Bank of Keokuk*, 1 Nat. Bak Cas. 315, says: "The words 'loans on personal security' in the Banking Act are used in contra-distinction to real estate security;" and in that case it was held that a National bank might take personal chattels — *e. g.*, a locomotive — as security for discounts and loans. And while section 5136, if not in terms, clearly by implication, prohibits a loan on real estate, yet the Supreme Court of the United States in *National Bank* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12 — not narrowing the application of the words "personal security" — held that where a National bank loaned money, and as collateral security took the assignment of a note secured by a mortgage of lands with a power of sale thereto annexed, the bank was entitled upon non-payment of the loan at maturity, to enforce the collection of the note by a sale of the lands.

Without commenting upon the numerous authorities which have been brought to our notice, we are of the opinion that the court below did not err in refusing to charge the jury that a National bank could not lawfully take personal property as security for a loan of money; and in taking the warehouse receipt from Lester as collateral security for the loan made to him, the bank did not transcend its powers.

We find no error in the refusal of the court below to charge the jury as requested, nor in the charge as given, in reference to the care used in making the loan to Lester, and the measure of inquiry as to the ownership of the flour that was required of the bank, before making the loan. Furthermore, we find no error, either in the refusal of the court to give in charge to the jury the last request of the plaintiff contained in the bill of exceptions, or in the charge thereupon given, "that if the bank in good faith loaned Lester the money and took the flour, believing in good faith it was Lester's, the transaction was valid."

By the general rule of the common law, an agent or factor, intrusted with the goods of his principal to sell, could not pledge the same so as to authorize the pledgee to hold them for advances made thereon to the factor or agent. *Patterson* v. *Tash*, 2 Strange, 1178; *Daubigny* v. *Duval*, 5 T. R. 604. But in modification of the common-law rule in this respect, statutes have been

passed in England and in this country, protecting the rights of the pledgee to the extent of the advances he had made upon the faith of the pledge, and in the belief that the factor was the owner of the goods. By the act of March 12, 1844, sections 3 and 4 (1 S. & C. 421), in force at the commencement of this action, and the same as sections 3216 and 3217 of the Revised Statutes, it was provided:

"§ 3. Every factor or agent, intrusted with the possession of any bill of lading, custom-house permit or warehouse keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing, given by such other person upon the faith thereof.

"§ 4. Every person who shall hereafter accept any such merchandise in deposit from any such agent, as security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent, at the time of such deposit."

These provisions of the statute are not to be construed as furnishing protection to those who deal with factors or agents out of the ordinary course of business, with knowledge of their true character, and knowing that their power is restricted by the owner, in reference to the merchandise intrusted to them. While modifying the general rule of the common law, these enactments rest upon the preservation of good faith and honest dealing, on the part of persons contracting with factors for a pledge of the property held by them in a fiduciary capacity. Applying these statutory provisions to the facts in this case, we are led to the conclusion, that where a factor holding a warehouse receipt for the delivery of merchandise consigned to him by the owner to sell on commission, obtains a loan at a bank on his promissory note, and as collateral security therefor (and not to secure any antecedent debt or demand) duly transfers to the bank the warehouse receipt, and makes an agreement with the bank for the disposition of the merchandise, if the bank in good faith loans the money, and takes the warehouse receipt, and makes such agreement upon the faith

that the factor is the true owner of the merchandise, such transfer and agreement will be valid, and the bank will be entitled to hold the merchandise as security for the payment of the note.

It is not necessary here to consider what would be the rights of the First National Bank, or how far they would be affected, had it made the loan to Lester solely on the faith of the property pledged. It is evident from the record that Lester's note was taken and the money loaned to him not only on the faith of the thing pledged, but on the faith of his title to the property. The merchandise was accepted by the bank, not as security for any antecedent debt or demand, but for a new and simultaneous loan or advance of money.

We are therefore of the opinion that the bank was entitled to hold the flour represented by the warehouse receipt as security for the payment of Lester's note, and that the judgment of the District Court must be reversed, and that of the Court of Common Pleas affirmed.

Judgment accordingly.

Bank v. McIntire.

(40 Ohio St. 528.)

Organization from State bank. Executor — agreement — construction — statute of limitations — fraud.

Where a National bank is in fact organized as the successor of a State bank with the consent of more than two-thirds of the stockholders, it may hold and own assets of its predecessor, although in form it was organized as a new bank, and the assets were transferred to it as if by sale and purchase.

After a mortgage creditor had, in two actions, obtained decrees for sales of the mortgaged premises, the judgment debtor died testate. The will gave power to the executor to sell lands to pay debts. The holder of the decrees and the executor agreed that the latter might sell the mortgaged lands under said power — he promising to pay said decrees in full out of the proceeds, or out of other assets of the estate as preferred claims. The executor sold the lands for more than was due under the decrees; paid nothing on the decrees; paid out and distributed the entire estate to others, and died. In an action by the holder of said decrees against the executor's es-

tate: *Held*, (1) said agreement in effect "allowed" the decrees as valid claims against the estate of the mortgage debtor; (2) the holder of the decrees had a specific interest in so much of the purchase-money received by the executor as equaled the sum due on the decrees; and under the agreement, held a like interest in the other assets of the estate, as soon as the executor applied said purchase-money upon other debts; (3) as soon as the executor, by parting with those assets to others, made it impossible to pay said decrees out of his testator's estate, he became individually liable to the holder of said decrees; (4) such act by the executor was a fraud upon the holder of the decrees, and no statute of limitation could begin to run in his favor until said creditor had notice of the act.

ERROR to the District Court of Knox county. The head-note and opinion show the case.

John C. Devin, for plaintiff in error.

A. R. McIntire and *J. D. Critchfield*, for defendant in error.

GRANGER, C. J. Had the plaintiff power to become the owner of the assets of the Western Reserve Rank, including the decrees and judgments against Norton?

Congress intended to encourage the conversion of State banks into National banks. To further this intent it provided an easy mode of effecting the change without materially interrupting the business of the bank. When that mode was adopted the National bank became the owner of all the assets of its predecessor (the State bank), of whatever nature. In this case the First National Bank of Warren was organized by the stockholders of the State bank; it actually succeeded the Western Reserve Bank of Warren in its location and business, and became possessed of no assets that would not have belonged to it if the statutory mode of transformation had been adopted. In another mode the new National bank was legally constituted and assets of its predecessor transferred to it. As we construe the "Act to provide a National currency" it clothes a National bank with power to succeed a State bank; to hold and own its assets, and then pursue the business of banking under the limitations of the act itself. Whether it becomes such successor in the mode provided by the act, or in the manner adopted by the plaintiff, is immaterial in this case. We hold that the plaintiff is the legal owner of the claims set out

in the petition as amended. See first paragraph of the syllabus in *Ehrman* v. *Ins. Co.*, 35 Ohio St. 324; also the last paragraph of the opinion of PECK, J., in *White's Bank of Buffalo* v. *Toledo Ins. Co.*, 12 id. 610.

What is the nature of these claims?

Before Norton's death the Western Reserve Bank had obtained a personal judgment against him in one case and decrees in both for the sale of the mortgaged premises. Instead of making the executor a party to the cases, and enforcing sales under the decrees, the bank and Norton's executor agreed that the latter might use the power to sell, given by the will, he agreeing, as executor, to pay the decrees in full with interest and costs, as preferred claims. This agreement entitled the bank to receive from the executor so much of the proceeds of the mortgaged premises as equaled the decrees with the interest and costs, or to receive a like amount out of the other Norton assets, notwithstanding such payment to it might consume those assets and leave other liabilities of that estate unpaid. This arrangement was beneficial to the estate. It saved further costs and expenses in the suits, and gave the executor at least an opportunity for getting higher prices for the land. Such an agreement was within the scope of the executor's powers, and made it unnecessary for the bank to formally present the claims for allowance. If any such presentation was necessary, this agreement accepted the statements of Mr. Scribner as such presentation, and admitted that both decrees were valid claims against the estate. We think the four years' statute of limitation did not apply to either of them under the facts stated in the petition as amended or in the reply, and the Common Pleas did not err in overruling the demurrer to the reply to that defense.

Under the agreement the executor was required to pay the decrees out of the proceeds of the mortgaged premises, or out of the Norton estate as preferred claims. So long as he retained enough of that estate to make such payment, he did not make himself individually liable to the bank. This action is predicated upon such individual liability. It is true that the petition charges that part of the proceeds of the mortgaged premises and other assets of the Norton estate had come into the posses-

sion of the defendants, and sought to give effect to a lien upon them; but it prayed for a judgment against the Hurd estate, and the evidence showed that no Norton assets came to the defendants. The defendants are not liable in this action as, in any sense, the representatives of the Norton estate. Their only power and duty touching that estate was to file an account showing Hurd's transactions while executor, and to deliver to his successor, when appointed, the remaining moneys and assets, if any, of that estate.

Treating the action as one against the Hurd estate, upon his individual liability, when, if ever, did the statute of limitations begin to run? So long as he retained assets of Norton, sufficient to pay the decrees in full, his mere delay to make the promised payment created no personal liability. So long as the settlement of the Norton estate remained open; so long as Hurd delayed to file his accounts in the Probate Court, all unpaid claims that he, as executor, had admitted to be valid, remained in full force and effect against that estate. Holding the moneys and assets of the estate in a trust capacity, he held them subject to the right of the bank to priority in payment, and the moment he, by otherwise applying them, made it impossible for him to pay the bank out of the Norton estate, he became individually liable to the bank. But as such payment by him under the case shown was a fraud upon the bank, the statute would not begin to run in his favor, if at all, until the bank had knowledge that he had so acted as to incur this liability.

The petition does not show when the bank first acquired such knowledge. As it set out a valid claim to the proceeds of the sale of the mortgaged premises and averred that part of said proceeds were in defendant's hands, the Common Pleas did not err in overruling the demurrer to the petition as amended.

The defendants sought to avail themselves of the six years' bar. This imposed upon them the burden of proving that Hurd individually ought to have been sued more than six years before this action was begun. The exhibit from the Probate Court showed that Hurd had during his life-time disposed of all of the Norton assets, and so made it impossible to pay the bank out of that estate. But there was no evidence even tending to show when Hurd so

disabled himself, or when the bank first had notice of it. Hence, the Common Pleas did not err in finding that the plaintiff's action against the Hurd estate was not barred, or in overruling the motion for a new trial.

But that court did err, as we think, in holding the claim a preferred debt against the Hurd estate. If the record disclosed any specific assets of the Norton estate in the hands if the Hurd administrators, the plaintiff would be entitled to an order applying them upon the judgment; but no such fact is shown.

Judgments of the District Court and Common Pleas reversed and decree for plaintiffs for the amount found by the trial court, with interest and costs. Execution to run against the Hurd estate.

Miller v. First National Bank.

Same v. Third National Bank.

Same v. Merchants' National Bank.

(Ohio Sup. Ct., May 21, 1889.)

Taxation. Shares — in what name.

There is no authority in the statutes of the State, nor of the United States, for listing and valuing the shares in a National bank in the aggregate, and placing such aggregate on the tax-list in the name of the bank Such shares when listed and valued for taxation are required to be placed on the proper tax-list in the names of the respective owners.

The listing of the shares for taxation is provided for and secured by section 2765, R. S., and the correction of returns made by the cashier of the bank to the county auditor is provided for by section 2769 and not by section 2782, Id.

ERROR to District Court, Hamilton county. The action below was by the treasurer of Hamilton county against the First National Bank of Cincinnati. The questions arise upon a demurrer to the petition on the grounds (1) that there is a want of proper parties; and (2) that the petition does not state facts sufficient to constitute a cause of action. The petition is as follows:

"Plaintiff says that he is the duly elected and qualified treasurer of Hamilton county, Ohio, now holding and exercising said office, and that the defendant is a National bank incorporated under the laws of the United States, having now, and during all the time hereinafter referred to, its place of, and transacting its business in, Cincinnati, Hamilton county, Ohio. Plaintiff says that in each of the years 1877, 1878, 1879, 1880 and 1881, the said defendant, by its cashier, for the purposes of taxation, made a return to the auditor of Hamilton county, Ohio, purporting to be a true return of the resources and liabilities of said bank at the close of business on the Wednesday next preceding the second Monday of May of each of said years, but did not return any statement of the names and residences of the stockholders thereon, with the number of shares held by each, but, instead thereof, a written statement that said bank would pay the taxes for and on behalf of the stockholders; and said bank did pay the taxes levied, in accordance with said returns so made out; but plaintiff says that the auditor of said county of Hamilton in the year 1881 discovered that said returns were false. Thereupon, said auditor proceeded to correct said returns, and having fully inquired, in accordance with the requirements of the statute in such cases made and provided, into the amount of the personal property, money, credits and investments that said bank should have returned for each of said years, and having first notified the cashier of said bank, and permitted full opportunity for the same to be heard by its counsel and officers, to show that its said returns were correct, he, the said auditor, thereupon found that each of said returns were false, and that there had been omitted from the same, personal property which should have been included therein, and listed for taxation, of the value, for the year 1877, of $82,837, for the year 1878 of $475,522, for the year 1879 of $349,246, for the year 1880 of $481,159, and for the year 1881 of $377,827, which said sums the said auditor, on April 8, 1882, placed on the tax-list against the defendant, as and for the years 1877, 1878, 1879 and 1881, respectively, when the same should have been returned, and opposite to the same the taxes on said sums for the said years, amounting, for the year 1877, to the sum of $2,410.56; for the year 1878, to the sum of $13,571.40; for the year 1879, to the sum of $10,121.14; for the year 1880, to the sum of $14,915.50, and for the year 1881, to the sum of $8,837.76, which taxes now stand charged on the duplicate of said Hamilton county; that the same are due and unpaid, and the stockholders of said bank are indebted to the plaintiff, as treasurer of said county, in the said sum of $2,410.56, with interest thereon from December 20, 1877, and in the sum of $13,571.40, with interest thereon from December 20, 1878, and in the sum of $10,121.14, with interest thereon from December 20, 1879, and in the sum of $14,915.50, with interest thereon from December 20, 1880, and in the sum of $8,837.76, with interest thereon from December 20, 1881, which, though payment has often been demanded, the defendant has failed and refused, and still fails and refuses to pay. Plaintiff further says that the defendant, at all times during the years above mentioned, had in its possession, and now has, money and property belonging to its stockholders more than sufficient to pay all the sums of taxes so, as aforesaid, due from the said stockholders; but, instead of applying the same or any

part thereof to the payment of said taxes, has paid over large portions of the same as dividends to the said stockholders, although the defendant has been repeatedly notified, by the treasurer of said county, of the non-payment of said taxes; and, notwithstanding the premises, the defendant has, during all said years, been transferring, and permitting to be transferred, from one person to another, the stock thereof, as the stockholders therein have from time to time requested; and said defendant will, unless restrained by the order of this court, continue to refuse to pay said taxes, and will, at the same time, continue to pay dividends to stockholders of said bank, and to transfer the stock thereof to the great and irreparable damage of plaintiff. Wherefore, plaintiff prays that defendant, its officers and agents, be enjoined from paying to its stockholders, or any of them, any dividends, and from transferring on its book or otherwise any shares or share of its capital stock, until said taxes and interest shall have been paid in full; and that the court cause an account to be taken of the moneys and property in defendant's possession belonging to the several stockholders, and cause the taxes and interest, as aforesaid, due from them and each of them, to be paid in full out of said money and property in defendant's possession; and for such other and further relief as may be just."

"CHAS. EVANS,

"[Duly verified.] *County Solicitor.*"

The demurrer was sustained, and judgment rendered thereon for the defendant, which, on error, was affirmed by the District Court; and this proceeding is prosecuted to reverse both judgments on the ground that the Court of Common Pleas erred in sustaining the demurrer to the petition. The cases of *Miller, Treasurer*, v. *Merchants' National Bank of Cincinnati*, and *Same* v. *Third National Bank* were argued and submitted with the case here reported.

W. S. Little, Goss & Cohen, Foraker & Black, and *Rufus B. Smith*, County Solicitor, for plaintiff in error.

Lincoln & Stephens, for defendants in error.

MINSHALL, C. J. It is evident that the relief prayed for against the stockholders in this case cannot be granted, as they are not parties to the action; and unless the plaintiff is entitled to some relief upon the facts stated against the bank, the demurrer to the petition was properly sustained. And as regards the bank, there is but one question in the case that needs to be determined — for the determination of it will dispose of all the others that have been raised — and that is, whether the shares of stock in a Na-

tional bank are to be listed for taxation in the names of the shareholders or in the name of the bank. The power of the State to impose any tax upon such shares is conferred by the statutes of the United States. R. S., § 5219. This is not controverted. It is also true that the property of a National bank, other than its realty, cannot be subjected to taxation by a State or any of its subdivisions. The power conferred by the section just referred to is to include the "shares" in the valuation of the personal property of the "owner" or "holder" of such shares. A bank does not own the shares of its capital. It owns the capital, and the shares are owned by its stockholders. The capital is corporate property; the shares in it are the individual property of its shareholders. It is the latter that may be taxed, and not the former. No authority is conferred to assess them for taxation against the bank itself; and to so assess them would be but another form of taxing the capital of the bank itself, which no one contends could be done without the authority of Congress. A share in a bank is but a fractional part of its capital, owned by one who contributed an equivalent part of the capital, or his transferee; and the aggregate of all the shares held by individuals in a bank is equal to the aggregate of its capital; so that, if all the shares in a bank were assessed for taxation in its name, and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank. Again, as the shares are to be assessed for taxation according to their true value in money, a tax so levied would extend to and include all the property of the bank — its personalty, in the valuation placed on the shares in its capital stock, and its realty, under the exception contained in section 5219, U. S. R. S. It seems then to follow, as a necessary result, that shares in a National bank must be assessed for taxation in the names of the owners of them, and not in the name of the bank itself. The language of the statute under which the power is conferred on a State to tax such shares is such; and the power conferred must be confined to the language; or the exemption of the bank itself from taxation may be reduced to an empty expression. Nor do the statutes of the State on the subject of taxation contemplate or intend that such stock should be listed in the name of the bank. They con-

tain special provisions for the listing of the shares of the stockholders in incorporated banks. They are required to be listed at their true value in money, and taxed in the city, ward or village where located, and not elsewhere. The shares are not required to be listed by the shareholders themselves. This is done by the auditor of the county; and provision is then made for their equalization, and the hearing of complaints. To facilitate the enlistment of the stock, and its valuation for taxation, the bank is required to keep in the office where its business is transacted a full and complete list of the names and residences of its stockholders, and the number of shares held by each, open at all times during business hours to the inspection of all officers authorized to list or assess the value of such shares for taxation. R. S., § 2764 And then annually at the proper time in the month of May, the cashier is required to make out and return to the auditor a duplicate report "of the resources and liabilities" of the bank, "together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share." R. S., § 2765. This constitutes the listing of the stock for taxation, and is necessarily intended to be done in the names of the owners of it. No other reason can be perceived for the requirement that the names of the owners, and the number of shares held by each, shall be returned to the auditor. Having been thus listed, the auditor is required to fix the total value of the shares according to their true value in money, and deduct therefrom the value of the real estate included in the statement of resources, as the same stands upon the duplicate. This is evidently required for the purpose of arriving at the true value of the shares themselves, and constitutes their valuation by the auditor for taxation.

Provision is then made for their equalization by the annual county board, and finally by the State Board of Equalization; and it is to be noticed that a copy of the statement furnished by the cashier of the names of the stockholders, and the number of shares held by each, as well of the resources and liabilities of the bank, is, in each case, to be furnished by county auditor, first to the county board, and then to the State board; and, finally, on completion of the equalization by the State board, the Auditor

of State is required, forthwith, "to certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situate in such counties, which valuation shall be put upon the proper tax-lists." R. S., § 2810. It is the "shares" that are required to be put upon the proper tax-list; and as shares belong to their respective owners, and not to the bank, it would seem a very reasonable construction to say that they are to be placed on the list in the names of their owners, and not in that of the bank, particularly in view of the fact that they have been required to be listed, valued and equalized in the names of their owners. Again, unless the shares are assessed for taxation in the names of the shareholders, there would be no opportunity given a shareholder to have a deduction in his favor for any *bona fide* indebtedness on his part, and to which he would be entitled under the decisions in *Whitbeck* v. *Bank*, 127 U. S. 193, 199; *ante* 309; *Hills* v. *Bank*, 105 id. 319; *ante* 45; *Supervisors* v. *Stanley*, id. 305; *ante* 33. But if any doubt remained upon this point it would certainly be removed by the provisions contained in section 2839, Revised Statutes, making the tax a lien on the shares, and providing a remedy in case of its non-payment. The section is as follows:

"Any taxes assessed on any shares of stock, or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday of May in each year until such taxes are paid; and in case of the non-payment of such taxes at the time required by law by any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association to transfer, or permit to be transferred, the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full; and no dividend shall be paid on any stock so delinquent, as long as such taxes, penalties and costs, or any part thereof, remain due and unpaid."

Each and every provision of this section contemplates an assessment upon shares in the name of the shareholder, and are inconsistent with any other practice. The lien is fastened on the shares, and in case of the non-payment of the tax "by any shareholder," the consequence is visited upon him, and no one else. It is made unlawful for the cashier or any officer of the bank, on notice, to transfer, or permit the transfer, of his stock, or the payment of any dividends to him so long as the tax remains due

and unpaid. This view would not interfere with any arrangement by which a bank may, under the provisions of section 2840, Revised Statutes, as a matter of convenience to its shareholders and the public, agree to pay the taxes levied upon the stock of its shareholders, and deduct the same from dividends or other funds in its hands belonging to them. In such an arrangement the individual rights of shareholders are preserved, each being liable only for such taxes as may be assessed against stock held by himself. An agreement by the bank in such case to pay the taxes assessed against its shareholders might be enforced as any similar agreement. The assumption would be supported by its possession of funds belonging to the party whose liability is assumed, and against which it would have the right to credit itself for the payment so made on behalf of the shareholder. Such an arrangement in no way infringes the exemption of the bank from State taxation, nor impairs its efficiency as one of the fiscal agents of the general government, and finds full support in the principles announced by the Supreme Court of the United States in the decision of *Bank* v. *Com.*, 9 Wall. 353; 1 Nat. Bank Cas. 34, where a statute of the State of Kentucky, requiring the bank to pay a tax levied on the shares of its shareholders, was sustained; the tax being paid from funds of the shareholder in its hands, and not from the assets or capital of the bank. What then was the nature of the suit brought by the treasurer against the bank? It was not for taxes that had been assessed against all or any of its shareholders, and which they or any of them had neglected to pay, and which it might have paid under the provisions of section 2840, Revised Statutes, making it lawful for the bank to pay the taxes "assessed upon its shares * * * in the hands of its shareholders, respectively," deducting the same from any dividends that might be due or become due upon the same. The substance of the petition is that the cashier of the defendant, for the years named, made a return to the auditor, purporting to be a true return, of the resources and liabilities of the bank, but did not return any statement of the names of its stockholders, with the amount of stock held by each, and, instead thereof, returned a written statement that it would pay the taxes for and on behalf of the stockholders; and that it paid the taxes in accordance with said return; that

the auditor ascertained that the return was false, and proceeding to correct the same, ascertained the amounts omitted for each year, placed the same on the tax-list against the bank, and opposite thereto the taxes on the amounts omitted for the several years included. For this we fail to find any authority. Section 2782, Revised Statutes, applies to the case where an individual has made a false return of his property subject to taxation, and authorizes its correction "by charging such person on the duplicate with the proper amount of taxes." The bank is not subject to taxation, and could therefore have been charged with nothing under this section. But an adequate remedy was provided for the case under section 2679, and constitutes the only remedy where a cashier makes a false return to the auditor. Under this section the auditor may examine the books of the bank, and any officer or agent of it, under oath, together with such other persons as he may deem proper, "and make out the statement;" and any officer of the bank may be fined, not exceeding $100, for failing to make the statement, or for willfully making a false one. This would seem to be as efficient as it is rigid, for the purpose of securing true returns of bank shares for taxation.

A further claim is made that the bank, being charged on the duplicate with the amount of these taxes, the duplicate is, under section 2859, Revised Statutes, *prima facie* evidence that the tax is due, and that the burden is on the defendant to show that it is not. But that section applies only to the case where taxes "stand charged against any person," and are not paid as prescribed by law. As a National bank cannot be taxed by the State, the fact that it may stand charged with a tax upon the duplicate of a county furnishes no ground for an action of any kind against it. If they stand charged against its stockholders, or any of them, then an adequate remedy for their collection is provided in section 2840, above referred to. The argument, based on the averment that the cashier stated in the return that the bank would pay the taxes for and on account of its shareholders, cannot avail here. For, conceding that this statement amounted to an agreement on the part of the bank to pay them, and that the agreement was a valid one, still it is averred that it did pay the taxes levied, in accordance with the return, and the agreement

had that extent and no more. But it is apparent that the averment was made as setting forth part of the grounds on which the auditor acted in assuming to correct the returns that had been made by the cashier of the bank, and to charge it with taxes upon omissions for the years designated in the petition, and not as a ground for the recovery of a judgment against the bank for the breach of its agreement. No such judgment is prayed for, and whilst the prayer is no part of the cause of action, still it may be looked at for the purpose of construing the averments of the petition.

Judgments affirmed.

Steckel v. First National Bank of Allentown.

(93 Penn. St. 376.)

Officers — liability of bank for frauds of.

Plaintiff, who was a depositor in a National bank, requested a certificate of deposit drawing interest for a portion of his deposit. The teller of the bank gave him a certificate which purported to be issued by B. & Co., a private banking firm, and informed him in the presence of the cashier of the bank that this was the bank's certificate, upon which assurance plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. *Held*, that the bank was liable to the plaintiff for the amount of his deposit.

ACTION by Alfred P. Steckel and others to recover $3.251.63, a balance of money alleged to be deposited with defendant. The opinion states the case. The court below directed judgment for $251 in favor of plaintiffs, from which they took a writ of error.

E. I. Fox, *Evan Holben* and *D. D. Roper*, for plaintiffs.

Edward Harvey, *R. E. Wright, Jr.*, and *G. & H. Lear*, for defendant.

Paxson, J. The principal cause of complaint in this case is that the learned judge of the court below withdrew from the jury

the consideration of the question of fraud upon the ground that there was not sufficient evidence to submit it.

The plaintiffs kept an account with the corporation defendant, and were in the habit of making deposits and drawing checks in the usual manner. William H. Blumer was the president of the bank; his son, Jacob Blumer, was the cashier. Three of the directors, including the said William H. Blumer, composed the banking-house of William H. Blumer & Co., which carried on business but a few hundred feet distant from the First National Bank of Allentown. The plaintiffs having money on deposit with the bank, and being desirous of obtaining interest-bearing certificates therefor, called at the bank for that purpose. Dr. A. P. Steckel, one of the plaintiffs, testifies as to what occurred, substantially as follows: "I went to the bank every week or two to make my deposits; some time in August, when I made deposit, I asked the teller, George Straub, does the First National Bank take any money on certificates? He said, 'yes, sir; do you want to leave us some?' I said, 'no, not to-day.' I asked him whether the First National Bank issued certificates of deposit, and as a matter of course pay interest, and he said 'yes;' then I came there again in September, 1876, and made my ordinary deposit in the bank, and after we were through I said to the teller that I would take the First National Bank certificates for $700. I filled out a check, and he handed me a certificate; I looked at the certificate for $700; it was to be made on demand, and asked him, 'is this the First National Bank certificate?' the answer was, 'yes, sir, it is;' I then said, 'this reads Blumer & Co.; I want this distinctly understood, I want nothing but the First National Bank certificates;' he answered me that this was one and the same thing; that it should pass to the credit of the company, the same as it was before. With this assurance I took that certificate. This was in the presence of the cashier of the bank, Jacob A. Blumer." Two other certificates aggregating, with the one above mentioned, the sum of $3,000, were obtained under circumstances not essentially different. There was evidence that the president of the bank recognized them as binding upon the bank, and offered to reinstate the plaintiffs as they were before, when the bank examiner was through his examination. That examination however resulted in the closing of the bank.

We must assume the jury would have found the facts as testified to by the plaintiff Steckel. The facts established, we have a case of palpable fraud. It is not an answer to say the plaintiffs ought not to have been deceived, and with ordinary care would not have been. The fact that the Blumers were respectively president and cashier of the National Bank, as well as leading members of the banking-house of Blumer & Co., was calculated to mislead and deceive, and when told in positive terms that the certificates, although signed by Blumer & Co., were the certificates of the bank, the plaintiffs may readily have believed it was all right.

It was urged however that even if there was a fraud it does not affect the bank; that an agent can only act within the scope of his authority; and that a bank is not bound by the fraudulent representations of one or more of its officers. There is no doubt as to the general rule that an agent can only bind his principal so long as he acts within the scope of his authority; but we do not think the principle applies in this case. A bank is responsible for the safe-keeping of the money of a depositor, and it cannot set up fraud of its own officers as an answer to a demand for repayment. Public policy forbids it. The plaintiffs, after ascertaining the fraudulent character of the transaction, tendered the certificates to the bank and demanded the payment of their original deposit. In other words, they rescinded the contract on the ground of fraud. If their allegations are true, they had a right to do so, and proceed upon the original cause of action.

The question of fraud should have been submitted to the jury. What has been said sufficiently covers the points involved.

Judgment reversed and a *venire facias de novo* awarded.

ZEIGLER v. FIRST NATIONAL BANK OF ALLENTOWN.

(96 Penn. St. 393; 39 Am. Rep. 758.)

Officers — liability for frauds of.

Plaintiff, who was unable to read, deposited money in a National bank and took a certificate of deposit therefor, which the officers of the bank represented was a certificate of the bank. It was, on its face, the certificate of a

private banking firm, composed of some of the officers of the bank. *Held*, that the bank was liable for the amount of the deposit.

ACTION by Philip Zeigler to recover $2,980.80 alleged to be deposited with defendant. At the trial plaintiff proposed to prove that prior to 1874 he had done business at the Union National Bank of Reading; that for his own convenience he wished to change his bank, and applied to Blumer, the cashier of the First National Bank of Allentown, the defendant corporation, at its banking-house, and told Blumer that he wished to deposit money to be entered on a deposit book, and draw checks as he had done in the other bank; that Blumer informed him that the defendant bank did not do business in that manner, but that it would issue certificates of deposit for his deposit and he could draw checks upon the bank and the bank would pay them; that he deposited his money, took a certificate of deposit, which he was assured was the certificate of the First National Bank of Allentown by Blumer; that he was unable to read the certificate; that at the same time Blumer gave him a number of blank checks on said bank; that from time to time after that he deposited money and received certificates and drew checks on the said bank, which were paid; that on the 11th of October, 1876, a settlement of accounts between plaintiff and the bank was had, the checks drawn by plaintiff were surrendered, plaintiff made a deposit and a new certificate of deposit for the balance then due ($2,980.80) was given him by the officers of the bank. This certificate was in fact the certificate of the banking-house of Wm. H. Blumer & Co., a firm doing business near the bank, and whose members were the managing officers of the bank. That plaintiff did not then know that the certificate was that of the firm but believed it to be that of the bank; that he did not know of the existence of the firm named until after their failure, and the failure of the bank, which took place in 1877; that at the time of the issue of the certificate last named the firm named were insolvent, which fact was known to the officers of the bank.

This evidence was, on the objection of defendant, excluded by the trial court, and in the absence of evidence a verdict rendered for defendant. From the judgment entered upon it plaintiff took a writ of error

John Rupp and *John D. Stiles*, for plaintiff in error.

Edward Harvey and *R. E. Wright, Jr.*, for defendant in error.

PAXSON, J. When the plaintiff took his money to the First National Bank of Allentown and handed it to the cashier for deposit the bank became responsible therefor. The cashier was the executive officer of the bank, and authorized by the very nature of his office to receive money on deposit. After receiving it, no trick or fraud on his part by means of which the money was passed over to Blumer & Co., a firm in which the bank officers were largely interested and appeared to have had the control, could absolve the bank from its liability. No class of men have the confidence of the people to a greater extent than bank officers. Depositors do not deal with them at arms' length, and can be imposed on with the greatest ease by such officials. It would be monstrous to allow them to take advantage of the ignorant and unwary by reason of their position and the confidence which it inspires. It was doubtless a misfortune to this bank to have unworthy officials, if such should prove to be the case. It certainly was unwise to permit its chief officers to occupy a dual position with divided interests, but the consequences resulting therefrom cannot be visited upon those who dealt in good faith with the bank.

This case is ruled in a great measure by *Steckel* v. *First National Bank of Allentown*, just decided. It was error to reject the evidence contained in plaintiff's offer. The facts offered to be proved amounted to a fraud upon the plaintiff, and he was entitled to have the question passed upon by a jury.

Judgment reversed and a *venire de novo* awarded.

Resh v. First National Bank of Allentown.

(93 Penn. St. 397.)

Officers—liability for frauds of.

Defendant, who had money on deposit in a National bank, when demanding payment thereof, was induced by an officer of the bank to sign a promissory note, which was represented to him to be a receipt for the money. He was unable to read English. *Held*, that he was not liable to the bank upon the note.

ACTION upon a promissory note for $500, signed by the defendant below and payable to his own order and indorsed by him in blank. Upon the trial plaintiff below proved the note. Defendant offered to show in substance that at the time the note was made he held a certificate of deposit of the First National Bank of Allentown, the plaintiff, for $500, for moneys deposited by him in such bank; that on the 7th of March, 1877, he presented the certificate at the bank for payment; that he was requested by an officer of the bank to sign what the officer represented to him was a receipt for the amount, and that under such representation he signed the paper, which was the note in suit; that being unable to read or speak the English language he supposed the paper to be a receipt. This evidence, on the objection of plaintiff below, was excluded as incompetent. From a judgment for plaintiff defendant took a writ of error.

R. Clay Hamersly and *Thomas B. Metzger*, for plaintiff in error.

Edward Harvey and *R. E. Wright, Jr.*, for defendant in error.

Paxson, J. While this case differs somewhat in its facts from *Zeigler* v. *First National Bank of Allentown* and *Steckel* v. *First National Bank of Allentown*, just decided, it is similar in principle, and comes within the rulings of those cases.

The third assignment covers all that it is necessary to discuss. The court rejected evidence offered to prove that the note in suit

was procured from defendant below by fraud on the part of the bank officers; that he went to the bank to receive payment of a certificate of deposit for $500; that when the money was paid he signed a paper represented by the bank officer to be a receipt for $500, but which afterward turned out to be a note for $500, upon which this suit was brought.

It is true the plaintiff denies the facts upon which this offer was based. But this denial goes for nothing, as the jury were not allowed to pass upon them.

The evidence should have been admitted.

Judgment reversed and a *venire facias de novo* awarded.

WINTON v. LITTLE.

(94 Penn. St 64.)

Surety — forbearance. National bank — real estate security. Bank — release by officer — acquiescence. Evidence — deposition.

The failure of a creditor to revive a judgment does not discharge a surety unless there was an express agreement at the time of giving the judgment that it should be kept revived for the benefit of the surety.

Real estate security taken by a National bank for present or future advances is valid.

In 1872, a bank made a loan upon a note and confession of judgment signed also by sureties. The loan was negotiated by W., the president of the bank, and the note was made payable to "W., president or bearer," and the judgment stood in his name. To allow the principal debtor to sell a portion of the lands in 1874, W. executed a release of liens signed "W., president." In 1876, the note not being paid, execution was issued against the sureties. At their instance, the execution was enjoined and an issue framed between "W., president of the bank," and the sureties. This issue was tried in 1879. *Held*, that the long acquiescence of the bank in the acts of W. was a ratification of them, and it was bound by his release.

Depositions were taken in obedience to a rule of court in the presence of the parties, and the witnesses were cross-examined. The justice of the peace certified "that the above witnesses were duly qualified and examined at the time and place stated in the caption before me." *Held*, (1) that it is *prima facie* presumed that the depositions were properly reduced to writing and subscribed by the witnesses, and it was not error to admit them; (2) that no objection to the absence of the signature having been made in the court below, the point could not be raised in this court.

BEFORE SHARSWOOD, C. J., MERCUR, GORDON, PAXON, TRUNKEY, STERRETT and GREEN, JJ.

Error to the Court of Common Pleas of Susquehanna county. Issue upon a judgment which had been opened, wherein J. S. Little and H. P. Little, executors of Mary Little, were plaintiffs, and W. W. Winton, president of the Second National Bank of Scranton, defendant.

On December 2, 1872, J. S. Little, being indebted to the Second National Bank of Scranton in the sum of $2,955.17, applied to W. W. Winton, president, at the bank, for a loan of $4,000, to pay this and other indebtedness. The president agreed to lend the amount for one year at ten per cent interest, if Little would get his brother, H. P. Little, and his mother, Mary Little, to sign a judgment note for the amount. The same day the note in question was signed by these parties for $4,400, at one year, the interest being included. When the note was received at the bank, on the 3d, the amount of $4,000 was passed to the credit of J. S. Little. Judgment was entered on this note December 4, 1872, in Susquehanna county, where H. P. Little and Mary Little resided, and an exemplification of the record filed in Wyoming county, where J. S. Little resided; the lands which the judgment bound being situated in those counties.

The note not being paid at maturity a writ of *fieri facias* was issued March 3, 1876, and levied on the lands, whereupon H. P. Little and Mary Little made affidavit that they were sureties for J. S. Little, and that plaintiff had released land from the lien of the judgment without their consent, of sufficient value to pay the judgment. The sheriff was thereupon enjoined from selling, and a rule to open the judgment granted November 21, 1876. An additional affidavit was filed by leave of court, which set forth that there were some $800 in the hands of the assignee in bankruptcy of J. S. Little, which should be applied in payment of this judgment; that Little had other real estate of the value of $3,000; that he had paid $640 on the judgment for which no credit had been given, and that he had, without the knowledge or consent of the defendants in the judgment, made an agreement with the principal debtor, upon consideration, to extend the time of payment for one year.

In January, 1877, the rule to open the judgment was made absolute, and on November 17, 1877, the death of Mary Little was suggested and H. P. Little, her executor, substituted.

On April 27, 1878, a new affidavit was filed, setting forth that defendant had permitted the lien of the judgment to expire against land of J. S. Little, and that the United States District Court had authorized the sale of J. S. Little's property, discharged of the lien of this judgment, but bound by the lien of other and subsequent judgments, and leave was granted to enlarge the issue made by the other affidavits, if the court on the trial should be of opinion that the facts set forth constituted a defense.

On the trial the filing of this supplemental affidavit enlarging the issue was objected to, on the grounds: 1. That the facts set forth constituted no defense to the action. 2. That a new cause of action could not be set up after the death of one of the parties, which had changed the rules of evidence and would jeopardize the rights of plaintiffs.

Overruled. (First assignment of error.)

The plaintiffs proposed to prove that an arrangement was made between Mr. Winton, acting for the bank, and J. S. Little, to release certain real estate owned by the latter from the lien of the judgment, and that in pursuance of that arrangement a written release was secured of certain property, and was filed and is of record in this case.

They also stated that they did not propose to show that the directors passed a written resolution authorizing this release, but that upon the faith of the release a portion of the property was sold, and that it was procured for the purpose of enabling said Little to sell, and that he did sell and used this release for the purpose of showing that there was no judgment upon the property; that it was put upon the records of this court and stood there for five years; that no act was done in any manner by the directors affecting or repudiating it.

The release was signed "W. W. Winton, president." There was nothing in the offer to show that the bank or any of its officers knew of the release, nor was there any note of it made on the judgment docket.

Objections overruled. (Second assignment.)

The plaintiffs then proposed to read depositions of Mary Little and H. P. Little taken before a justice of the peace upon rule and notice during the life-time of Mary Little. Objected to on the ground that there is no proper certificate; it does not recite that they were reduced to writing by the justice, nor that they were subscribed to in his presence by the parties. Objection overruled, because they were taken in the presence of both parties and have been on file. (Third assignment.)

The plaintiffs presented the following points, to which are appended the answers of the court:

1. If the jury believe that the judgment in this case was given to secure future advances to be made to the principal debtor, J. S. Little, by the Second National Bank of Scranton, the judgment was absolutely void, and the plaintiff therein cannot recover.

2. If the judgment in this case was given in part to secure future advances to be made to J. S. Little, and in part to secure the payment of a debt already due the bank by J. S. Little, the judgment is void as to the part given to secure such future advances, and as to that part the plaintiff therein cannot recover.

A. "You will perceive that this presents questions of the fact which we have already submitted to you, and we have virtually answered these two points in our general charge. We now however affirm these propositions, with the qualification that it is for you to ascertain from the evidence whether these facts are established." (Ninth and tenth assignments.)

The following were among the points of defendant, with the answers of the court thereto:

5. That the sureties having shown no authority in W. W. Winton to execute the release of the lien of this judgment, the same is not valid and binding upon the plaintiff in the judgment and does not operate to release the sureties unless the act was ratified by the plaintiff subsequently.

A. "We decline this proposition, and leave it with such suggestions and instructions as we have already given you upon that point." (Eleventh assignment.)

6. That there can be no ratification of an act of an agent of which the principal has no knowledge, and the mere fact of filing

a paper purporting to be a release in the Common Pleas docket of a county distant from the place of business of a bank, is no evidence of notice to the bank.

A. "This proposition we cannot affirm. The bank is the plaintiff in the judgment, and is bound to understand the situation of its own record and its own claims. It would be a natural presumption that bankers are pretty sharp ordinarily in attending to their business, and would hardly allow a record to stand with a release of land which would be subject to the lien of the judgment for a period of four or five years filed in the case in which they had their judgment. Besides that, we have the evidence of the fact that the release was executed at the bank by Mr. Winton, and was done in the same manner and between the same persons that the original loan was negotiated, and the note given was signed in the same manner and made payable to W. W. Winton, president, or 'pres't,' which signified president, and that the lease was filed as executed by the parties under these circumstances." (Twelfth assignment.)

8. That the release in evidence is not the release of the defendants in the issue, and they are not bound by it.

A. "We will have to decline that proposition. We have left it to you as a question of fact under the evidence whether it is the act of the defendants or ratified or approved by them." (Thirteenth assignment.)

9. That the failure of a creditor to revive a judgment does not discharge a surety unless there has been an express agreement at the time of signing the note or giving the judgment that the same should be kept revived for the benefit of such surety, and there is no evidence of such agreement on the part of the defendants in the issue with the sureties or either of them, and upon this point the verdict must be for the defendants in the issue.

A. "We decline that proposition, with the qualification that a creditor could not release property that was bound by the judgment without releasing the sureties. If he could not do it by a direct act, he certainly could not do it by so negligently looking after the security of the principal as to let his property slip out from the lien of the judgment and then look to the security for it." (Fourteenth assignment.)

11. That upon the whole evidence the defendants in this issue are entitled to recover the amount of the judgment, less the two payments of $400 each and the sum of $869.60 received from W. T. Moxley, assignee.

A. "We cannot of course affirm that proposition under the instructions which we have given in the general charge." (Fifteenth assignment.)

In the general charge, the court, *inter alia*, said: "But it is alleged that this judgment was given to a National bank for the security of money to be advanced. We propose to submit to you as a question of fact whether it was given as security for advances to be made. When, if you find that it was a National bank (and we shall have to take the party itself as it stands upon the record, and put itself into this court, claiming to be such), and if you further find that this judgment was given as security for money to be advanced or loaned in the future to J. S. Little, then the judgment would be void as against the sureties, and there would be no recovery in this case in favor of the plaintiff in the judgment. If however it was given part for debt accrued and due from Little to the bank, and in part for loans to be advanced to him afterward, then you will ascertain how much was due from Little to the bank, at the time the judgment-note was given, to-wit: the 2d of December, 1872, because that part which was actually due from Little to the bank at that time was a proper subject-matter to be secured by a mortgage or judgment-note, under the laws of the United States authorizing the organization and management of National banks, under the law which is particularly known as the National Bank Law. The law makes a difference between debts accrued and debts to be created, or loans to be effected afterward. That distinction is attempted to be made here as between a mortgage and a judgment. A judgment it is said might have accrued and not been entered up. But we will leave to you as a question of fact, under all the evidence, whether it was in contemplation of the parties at the time to give that judgment for money already loaned and for money to be loaned, or for the security that the judgment would afford the bank by reason of the lien it would have upon the real estate. If that was the ground or basis of the contract, and the foundation

of that transaction, then it was taking security upon real estate for loans to be made afterward; that is, if you find the fact to be that Little did not owe them the actual amount of $4,000; and the law does not permit the taking of security upon real estate by a National bank as regards advances to be made subsequently. If you arrive at the conclusion that this note was given in part for money due and in part for money to be loaned afterward it will be necessary for you to determine the amount that was actually due to the bank when that note was given, and take that part and compute the interest on it up to the time these various payments were made, deduct the payments from the amount of the principal with interest added, and ascertain whether there is any balance due, and if so how much to the plaintiff in the judgment." * * (Fourth and fifth assignments.)

"You have heard the evidence in regard to the release which has been referred to, and we propose to submit to you as a question of fact whether that release was executed properly. That is, whether it was made properly by W. W. Winton, as president of the bank, with the approval of or subsequent ratification by the bank itself." * * * (Sixth assignment.)

"You will consider them all, and ascertain whether there is in the evidence sufficient to warrant you in the conclusion that W. W. Winton acted as the president of that bank by the authority or approval or consent of the bank in that matter, and in connection with that you will take into consideration the fact that they had a judgment upon the records of this court, placed there by themselves, and they could be reasonably expected in law to know the condition of their own judgment as it showed upon the record." * * * (Seventh assignment.)

"If you find that this release was made by Winton with proper authority, or proper approval, then you will deduct from this judgment the value of so much land as was released, as established by the evidence." (Eighth assignment.)

"We have instructed you that you will ascertain whether the judgment was valid under the act of Congress, and whether it was in whole or in part a security for loans to be effected thereafter; and to the extent that it was given for debts of J. S. Little to the bank, existing at the time, it was a good and valid judg-

ment up to the time the release was executed; and at that time you will ascertain the value of the property released and deduct it from the amount of the judgment and interest up to that time, deducting the payments that are specified here — two $400 payments and one of $869.60—and so make your computation in regard to the amount." (Sixteenth assignment.)

Verdict for the plaintiffs in the issue.

W. H. & H. C. Jessup, for plaintiff in error.

D. & H. M. Hannah and *McCollum & Watson*, for defendants in error.

TRUNKEY, J. Whether error was committed in any ruling against the defendants is a question they have not brought here, and cannot now be considered.

It can scarcely be said that the court did not fairly and properly treat the case as if it were conceded by the parties that the judgment was owned by the Second National Bank of Scranton, incorporated and doing business under the laws of the United States. If this was error, we fail to see any reason why the bank should complain. The judgment was confessed by virtue of a warrant of attorney on a note payable to "W. W. Winton, president, or bearer," and he stands as plaintiff with the words, "President of the Second National Bank of Scranton" appended to his name. If they mean nothing, he alone is the plaintiff in interest, and they may be treated as surplusage. Putting them on the record did not impose the burden of proving what they meant upon the defendants. In absence of evidence or concession of a corporation, the judgment was Winton's, and inquiry respecting his authority to release its lien on real estate, or of the right of a National bank to take a judgment to secure future advances, would be impertinent. A glance at the case as presented shows that in fact it was tried on the theory that the note was given for money of the bank of which Winton was president, and therefore the assignments will be considered as if the bank has a right to be heard in their support, notwithstanding its point that there is no evidence of its incorporation.

This judgment was entered in favor of Winton on a note taken in his name in 1872. An execution was issued in 1876, and on defendant's application, the writ was stayed and judgment opened. The trial was in April, 1879. During all that time the directors of the bank knew, or ought to have known, that the judgment appeared in favor of Winton, and not the bank, and no move was made to put it in the bank's name. In 1874 Winton gave a release of lien to enable the principal debtor to sell and convey a part of his land. Winton negotiated the loan and did all business respecting it. Why did the directors suffer the judgment to stand in his name, if they had not given him authority to take it? If no such authority was given, what was the long acquiescence but a ratification? Though the appended words be sufficient notice of the claim of the bank, it would be commonly understood that it was put in Winton's name for the very purpose that he could control it as his own. The bank had a legal existence, and was capable of acting, suing and receipting in its own name. If it chose to put the judgment in the name of another, it ought to be bound by his acts with others in dealing with it. There was no conspiracy to defraud the bank between Winton and the purchaser of the land, and if by the agent's mistaken judgment any must suffer, the loss should fall on the one that gave him power to act. It may be true, as alleged, that the release does not purport to be the release of the bank; but it purports to be the release of the party to whom the note was payable and who held the judgment. We are not convinced that error was committed in the rulings and instructions set forth in the second, sixth, seventh, eighth, eleventh, twelfth and thirteenth assignments.

The depositions of Mary Little and H. P. Little stood as if they had just been taken and offered in evidence, no notice having been given, as provided by the rule of court, of the filing. When offered, the plaintiff objected "on the ground that there is no proper certificate; it does not recite that they were reduced to writing by the justice, nor that they were subscribed in his presence by the parties." Here he is confined to the objection taken in the court below. The depositions were taken in obedience to a rule of court, in presence of the parties, the witnesses cross-examined, and we do not think the certificate fatally de-

fective. In such case, it is presumed that the depositions were properly reduced to writing and subscribed by the witnesses in presence of the justice until the contrary is shown. No objection was made that H. P. Little had not signed his deposition. The third assignment is not sustained.

As a proposition, the plaintiffs' ninth point should have been affirmed, unless refused on the ground that there was no evidence of the fact on which it was based. The answer indicates that the fact was submitted. Mere forbearance, however prejudicial to the surety, will not discharge him. This rule applies where a creditor suffers a judgment to lose its lien for want of revival against the principal debtor, and thereby subsequent creditors are enabled to take the land. *United States* v. *Simpson*, 3 P. & W. 437. The fourteenth assignment is well taken.

On the authority of *Union Nat. Bank of St. Louis* v. *Matthews*, 98 U. S. 621; 2 Nat. Bank Cas. 12, the instructions complained of in the fourth, fifth, ninth, tenth and sixteenth assignments were erroneous. That case has settled that real estate security taken by a National bank for present or future advances is valid, and all conflicting decisions in the State courts must give way. It is there said: "Our attention has been called to but a single point which requires consideration, and that is whether the deed of trust can be enforced for the benefit of the bank." After noting that the Supreme Court of Missouri held the deed of trust to be the same thing as a mortgage, and that the loan was made on real estate security, it is held, "These things render it proper to consider the case in that aspect, and conceding them to be as claimed, the consequences insisted on by no means necessarily follow. The statute does not declare such security void; it is silent upon the subject. If Congress so meant it would have been easy to say so, and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. * * * The impending danger of a judgment of ouster and dissolution was we think the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see

fit to invoke its application. A private person cannot directly or indirectly usurp this function of the government." Justice MILLER dissented, on the ground that the act of Congress forbade National banks to take real estate security for money loaned at the time of the transaction, and that such security is void in the hands of the bank.

The point arises under a statute of the United States, and having been decided by the United States Supreme Court, the prior rulings of this court, so far as in conflict, fall.

Judgment reversed, and a *venire facias de novo* awarded.

MONONGAHELA NATIONAL BANK v. OVERHOLT.

(96 Penn. St. 327.)

Interest — action to recover double usurious — when accrues — bankruptcy — who may sue.

The right of action to recover double the amount of usurious interest paid to a National bank, as provided by section 5197 of the National Banking Act, accrues upon the actual payment by the borrower of the amount of the illegal interest to the bank, and can be maintained whether the debt has been paid or not.

The party paying such illegal interest cannot recover for it after his discharge in bankruptcy, but the right of action vests in the assignee.

BEFORE MERCUR, GORDON, PAXSON, TRUNKEY, STERRETT and GREEN, JJ.

Error to the Court of Common Pleas of Fayette county. Debt against a National bank to recover double the amount of usurious interest paid.

The court refused the following points:

1. That the notes on which the usurious interest is claimed, never having been paid, the plaintiff is not entitled to recover.

2. The plaintiff having been discharged as a bankrupt since the usurious interest was paid, he cannot recover.

Verdict for plaintiff, and after judgment the bank took this writ.

D. Kaine, for plaintiff in error.

R. H. Lindsey, for defendant in error.

TRUNKEY, J. Section 5191 of the National Banking Act (U. S. R. S.) prescribes the rates of interest which banks may receive. The next section is:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or legal representatives, may recover back in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same; provided that such action is commenced within two years from the time the usurious transaction occurred."

Upon the actual payment by the borrower and receipt of the illegal interest by the bank, the right of action accrues and can be maintained whether the debt has been paid or not. This cannot be more clearly expressed than in the words of the statute, and decisions under other statutes having little similarity to this do not warrant departure from the plain meaning of the remedial and punitory provision.

On June 25, 1878, the plaintiff presented his petition for adjudication in bankruptcy, and he was duly discharged on February 7, 1879. This action was commenced after his discharge, and the usurious transaction occurred prior to his petition for adjudication. Did the right of action pass as part of his estate to the assignee? The broad and comprehensive terms of the Bankrupt Act vest in the assignee for creditors the entire estate of the bankrupt debtor, except exemptions which are intended to protect him and his family from temporary distress. All debts due him, all rights in equity, choses in action and rights of action arising from contract, or from the unlawful taking or detention or injury to the property of the bankrupt, pass at once to the assignee on his appointment, in virtue of the adjudication in bankruptcy. The assignee has like remedy to recover all the estate, debts and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment been made.

Rights of action for torts to the debtor's person do not pass, nor the right to sue for a penalty; these are not assignable.

It must be conceded that the sum which may be recovered from an association where illegal interest has been paid is so penal in in its character that it is commonly called a penalty. But is not the act in strictness more remedial than penal? Taking interest beyond the prescribed rates is not a criminal offense, does not forfeit the debt, or give a *qui tam* action to an informer, is not denounced by pains and penalties as was usury by the common law or ancient statutes. Nor is the right limited to the person who paid the excessive interest, for it may pass to his legal representative; and in this respect it is not treated as a penalty or tort to the person. He may recover back twice the amount of interest thus paid by action in the nature of debt, and this is akin to double or treble damages for injuries allowed by certain statutes for the twofold purpose of compensation and example. In actions at common law exemplary damages are frequently recovered. The only vindicatory part of the statute as respects usury is that providing remedies for the borrower against the association which has exacted illegal interest. These operate to recompense the borrower and punish the lender for the wrong done. Enough of the old doctrine of usury pervades the statute to place the borrower, who has paid or agreed to pay excessive interest, in the light of one injured in his property; but the lender is not made a criminal.

Decisions of the Federal courts are conflicting on the question whether the right of action vests in the assignee. As advised, it has not been decided by the United States Supreme Court. Among the cases in the District Courts where it has been held that the assignee of a bankrupt cannot maintain the action, is *Brombey* v. *Smith*, 5 Nat. Bank. Reg. 152. On the other hand, in *Crocker* v. *First National Bank of Chetopa*, 3 Cent. L. Jour. 527; 1 Nat. Bank Cas. 317, DILLON, C. J., ruled that the right passed to the assignee, saying: "It is our opinion that the assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced by an action in the nature of an action of debt, peculiarly and most appropriately the legal representative of the bank-

rupt. Every reason which in case of the death of the debtor, without bankruptcy, would give the right of action to his administrator or executor as his legal representative, applies with full force to the assignee in bankruptcy if his estate is, during his life-time, administered in a court of bankruptcy." A number of cases are to same purpose, among them *Wright* v. *First National Bank of Greensburg*, 18 Nat. Bank. Reg. 87; 2 Nat. Bank Cas. 138.

Nichols v. *Bellows*, 22 Vt. 581; 54 Am. Dec. 85, a case under the usury laws of Vermont, seems to support the view that the action is not assignable. In *Gray* v. *Bennett*, 3 Metc. 522, a well-considered case, it was decided that an insolvent debtor's right of action for recovery of threefold the amount of interest paid by him on a usurious contract, passes by the assignment of his estate, and his assignee may maintain a bill in equity to recover it. It was there claimed that the statute forfeiting threefold the amount of interest reserved, being in its nature penal, it resolves the demand into a mere claim for redress for a personal tort, which cannot be assigned. But the court, upon a careful review of the cases touching the principle, held that the threefold act, while penal to some extent in its consequences, is so far remedial that it has the like privilege of liberal construction with those statutes which are wholly remedial; that the interest of the insolvent debtor was a vested interest and not a mere personal right, and unless it can be clearly shown by the statute that such an interest was not intended to be passed to the assignee, it becomes, by force of the assignment, vested in him.

The weight of authority, and what we deem the better reasoning, impel to the conclusion that the bankrupt had a vested interest under the statute giving him a right to recover back twice the amount of interest he had paid, and that it was vested in the assignee in virtue of the adjudication in bankruptcy. The defendant's second point should have been affirmed.

Judgment reversed.

National Bank of Fayette County v. Dushane.

(96 Penn. St. 340.)

Usury — set-off.

Where usurious interest has been paid to a National bank on renewal notes, and the bank brings suit on the last note, the defendant may not set off such illegal interest, but his only remedy is by an action against the bank to recover the penalty prescribed by the National Bank Act.

BEFORE Mercur, Gordon, Paxson, Trunkey, Sterrett and Green, JJ.

Error by plaintiff to the Court of Common Pleas of Fayette county. Assumpsit against administrators of the estate of Martin O. Tinstman, deceased, to recover a balance on a note made by said Tinstman. Defense, usury. The trial court instructed:

"That if the jury find from the evidence that the plaintiff has charged and received a rate of interest over six per cent on the note in suit, and the several notes of which it is a renewal, that the interest-bearing quality of said notes is thereby destroyed, and no interest can be allowed; and that the defendant is entitled to a credit against the face of the note of all payments made."

Nathaniel Ewing, for plaintiff in error.

Boyle & Mestrezat, for defendants in error.

Gordon, J. This case, on the authority of the recent decisions of the Supreme Court of the United States (*Barnett* v. *National Bank*, 98 U. S. 555; 2 Nat. Bank Cas. 18), must be reversed. It was there held that usurious interest previously received by a National bank, though taken in the renewals of a series of bills of which the one in suit was the last, could not be pleaded by way of set-off, and that the only remedy was by an action of debt founded on the penal clause of the act of Congress. This case of course overrules *Lucas* v. *Bank*, 78 Penn. St. 228; 1 Nat. Bank Cas. 872; *Overholt* v. *Bank*, 82 Penn. St. 490; 1 Nat. Bank Cas. 883, and all cases of a similar character, at least so far as they hold

that illegal interest taken by a National bank can be used by way of set-off or payment.

In a transaction like the one in hand, from the case above cited, it will be found that the defendants' only remedy was by a penal action for double the illegal interest paid, and that the forfeiture of the interest upon the note only occurs where illegal interest has been stipulated for but not paid It follows that the plaintiff should have been permitted to recover the full amount of the note in suit with interest.

Judgment reversed, and a new venire ordered.

Appeal of Second National Bank of Titusville.

Henderson, to use of Second National Bank of Titusville, v. Waid.

(96 Penn. St. 460.)

Judgment — collateral impeachment. Usury — recovery of lawful interest.

An auditor appointed to distribute the proceeds of a sheriff's sale may not go behind a judgment regularly entered upon adverse proceedings without fraud and collusion.

The taking of usurious interest under section 5197 of the Revised Statutes of the United States, and the Pennsylvania act of May 28, 1858, does not prevent the recovery of the lawful interest.

BEFORE Agnew, C. J., Mercur, Gordon, Paxson, Trunkey, Woodward and Sterrett, JJ.

Error to the Court of Common Pleas of Crawford county. The facts are stated in the opinion.

Roger Sherman, for appellant.

Guthrie & Byles, for appellees.

Paxson, J. This controversy has arisen in the distribution of the proceeds of a sheriff's sale of the real estate of Zephaniah Waid. At the date of the sale the Second National Bank of

Titusville held a judgment amounting to $2,156.12, and William M. Henderson was plaintiff in a judgment for the use of the same bank, amounting to $1,879.73. Waid became the indorser of a note of Shugert & Starr to the bank for $2,500 on the 18th of December, 1872. In a suit subsequently brought on it judgment was obtained on the 29th of May, 1873. Before the note was given interest at the rate of ten per cent had been paid by Shugert & Starr on the debt it represented to the amount of $125.68. When it was given on the 18th of December, 1872, a discount at the rate of twelve per cent, amounting to $77.50, was retained. It was the second renewal of a note originally given on the 3d of May, and first renewed on the 6th of September, 1872. It was only at the date of the second renewal that Waid became indorser. Upon the proof that usurious interest had been reserved the auditor decided that "the interest-bearing power of the obligation had been destroyed," and "as there was no point of time in the history of such paper at which it could be freed from the taint of illegality, so it followed that there could be no point of time from which it would bear interest." Under the view of the law thus taken in the report, the costs, the attorney's commission of five per cent, stipulated for in the note, charges for protests, and all interest accrued on the original note and its renewals, and on the judgment, were excluded from the allowance made to the bank. There was also deducted the interest, attorney's fees and costs accrued in a judgment on a note for $1,700, made up in part of an independent note for $1,500, previously discounted, and in part of interest and costs of the judgment obtained on the note of Shugert & Starr. On the same ground of usury the sum of $111.99 was deducted from the Henderson judgment.

These rulings of the auditor were affirmed by the court upon exceptions. It has been settled by a line of authority that in the distribution of a fund an auditor cannot inquire into the validity of a judgment regular upon its face. *Dyott's Estate*, 2 W. & S. 557; *Leeds* v. *Bender*, 6 id. 315; *Ellmaker* v. *Ins. Co.*, id. 442; *Thompson's Appeal*, 57 Penn. St. 175. But he may receive testimony to show that since its rendition the judgment has been paid or otherwise satisfied (*Borland's Appeal*, 66 Penn. St. 470); and he may disregard a judgment void upon its face (*Brunner's*

Appeal, 11 Wright, 67); but not because it is merely erroneous (*Harris' Appeal*, 5 W. & S. 473); or a fraud upon the debtor. *Thompson's Appeal*, *supra*. All the cases say that the mere fact that the debtor has been overreached and a fraud perpetrated upon him by the creditor gives no right to other creditors to attack the judgment collaterally. So long as it stands as a valid judgment against the defendant it is good against them. They have no right to complain of a fraud upon him. In such cases the only person who can impeach the judgment is the defendant himself, and this must be done by a motion in the proper court to open it. When a judgment is assailed in this way before an auditor, it is his duty, as was pointed out in *Dyott's Estate* and *Leeds* v. *Bender*, *supra*, to suspend his decision until its validity can be decided by the court in which it was entered. It would be an anomalous proceeding for an auditor to try the validity as between the parties of a solemn judgment of the court that appointed him, yet more so of the judgment of the court of another county or another State. When however a judgment has been fraudulently given by collusion between the debtor and the plaintiff in such judgment for the purpose of hindering and delaying creditors it may be attacked collaterally by the creditors intended to be defrauded. *Dougherty's Estate*, 9 W. & S. 189; *Lewis* v. *Rogers*, 4 Harr. 19; *Thompson's Appeal*, *supra*. As to them such judgment is void. But they can only have it set aside as to themselves They cannot impair it as between the parties.

If then creditors may not impeach a judgment before an auditor for a fraud upon the debtor, it follows that in order to sustain the auditor and the court below, we must go to the extent of holding that the usury complained of was a fraud upon the creditors — a collusive fraud to hinder and delay them. That there was fraud and collusion in fact is not pretended, which drives us to the yet narrower question, whether an usurious contract is a fraud *per se* upon creditors. It was said in *Good* v. *Grant*, 76 Penn. St. 52, that "to pay interest in excess of the legal rate is not necessarily fraudulent as to creditors." And in *Miners' Trust Company Bank* v. *Roseberry*, 81 Penn. St, 309, it was said by MERCUR, J., "Whenever the usurious contract is intended to defraud creditors, or when the circumstances of the debtor are known to

be such that it can reasonably be presumed that this will be the natural effect, the right of creditors to postpone the excess of interest must be conceded;" but in each of these cases the question whether any one but the borrower could go behind the judgment was left undecided, as it had been left undecided in *Vernon* v. *Carson*, 66 Penn. St. 440. In *Greene* v. *Tyler*, 3 Wright, 361, it was held competent for a second mortgagee to question in a distribution a prior mortgage on the ground of usury, and in *Bachdell's Appeal*, 56 Penn. St. 386, the syllabus states the point of the case to be that "an auditor reported that judgment creditors could question the validity of a prior judgment on the ground of usury, and reduce a usurious judgment. Accordingly the court below, on exceptions, confirmed the report in this particular." The decision of the auditor was rested wholly on the authority of *Greene* v. *Tyler*. This point was not alluded to by Chief Justice Thompson in delivering the opinion of the court, which consisted of nine lines devoted to reversing the decree, because interest had been allowed on a judgment after the day of sale. No paper book was furnished on behalf of the appellee, and the point was manifestly overlooked by the chief justice, who delivered the opinion in the subsequent case of *Edwards' Appeal*, 76 Penn. St. 89. *Greene* v. *Tyler* certainly decided that a usurious consideration could be inquired into by a subsequent mortgagee, and as before observed in *Bachdell's Appeal*, was ruled by the auditor solely on this authority. It would seem by an examination of the opinion in *Greene* v. *Tyler* that considerable stress was laid upon the fact that the second mortgagee had a specific lien on the very thing sold by the sheriff, and that his lien attached before the judgment was confessed upon the first mortgage, as to which the usury was charged. It also appeared that the mortgage was given for $2,000 more than was actually received or loaned thereon. It is not essential however to question the soundness of either of those decisions. While the broad question whether usury was a fraud *per se* upon creditors appears rather to have been assumed than discussed, we may concede those cases to have been rightly decided to the extent of their own facts. At that time the taking of more than six per cent interest was unlawful, and subjected the lender to a penalty. It is not so now. The act of 28th of May,

1858 (Pamph. L. 622), has made a radical change in this respect. By the first section of said act six per cent is allowed to be the legal rate of interest where no express contract has been made for a less rate. The second section recognized the right to reserve or contract for a higher rate, but provides that in such case the creditor shall not compel his debtor to pay more than six per cent; authorizes the debtor to retain and deduct the amount of the excess from such debt, and when he has voluntarily paid such excess, to recover it by an action to be commenced within six months after such payment. It is not therefore now unlawful for a debtor to pay and a creditor to receive more than six cent. And when it is done in good faith, and in the usual course of business, it would shock the common sense of every intelligent man for any court to say that it was a collusive fraud between the creditor and his debtor to cheat and defraud the creditor of the latter. It may be that such collusive scheme might be covered up under the guise of usury. When it exists it can be as readily detected under the cover of a usurious contract as of any of the other devices which are resorted to for such purpose. But the mere fact that the debtor pays more than six per cent is not enough to establish a fraud upon creditors. Nor would his refusal to contest the claim against him of itself amount to such fraud. A man who has in good faith contracted to pay more than six per cent has committed no violation of any law, and is not bound to repudiate his contract. A very large class of honorable and upright men would regard it as dishonest to do so. I do not say that there might not be a case where, in a transaction out of the ordinary course of business and under circumstances tending to show collusion, a refusal by the debtor to set up such a defense might not be evidence with other matters of an intent to defraud creditors. Such cases must be disposed of when they arise. The recent legislation referred to has, to some extent, recognized the actual wants of business men, and evinces a growing tendency to regard money as an article, the price of which must be regulated by the law of supply and demand. It has always been so, and it always will be so. No law can enable the thriftless man to borrow money as cheaply as the prosperous man, or to get money when it is scarce at the same rate as when it is abundant.

The appellant in this case is a National bank. Section 5197 of the Revised Statutes allows such banks to charge and reserve such rates of interest as is authorized by the laws of the State where the bank is located, and section 5198 provides that

"Knowingly taking, receiving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

Thus it will be seen that under the act of Congress no interest can be recovered upon usurious contracts, while by the law of this State the legal interest can be recovered, but no more. While the former uses the word "forfeiture," and is penal to the extent of the interest, it does not make the entire contract void or even voidable. If under our act of 1858 it is not a fraud *per se* upon creditors for a debtor to pay more than the legal rate of interest, it would be straining the law to say that it is so under the act of Congress.

The whole question of interest is regulated by our own statute. The act of Congress applies only to the National banks; and as to them the rate of interest conforms to the State law. When creditors allege that usury is a fraud upon them, they must do more than show the payment in the usual course of business of interest in excess of the legal rate.

That is a matter of which the debtor alone can complain. In the case in hand there exists nothing to show collusion to defraud creditors. It follows that they had no standing before the auditor to set aside the appellants' judgment.

Even in view of the record as it was made up by the auditor, the case did not justify the charging the costs of the distribution upon the appellants. The questions were fit to be raised, and the position of the appellants entitled them to raise them.

The decree of the Common Pleas is reversed, and it is now adjudged and decreed that the fund in court be applied, first, to the costs of the distribution; secondly, to the city's claim for taxes, sewer and paving assessments; and thirdly, to the judgments in their order for the amounts shown by the record to have been due upon them respectively at the date of the sheriff's sale. The costs of this appeal to be paid by the appellees.

Lebanon National Bank v. Karmany.

(98 Penn. St. 65.)

Interest — action to recover double usurious, paid — jurisdiction — set-off.

State courts have jurisdiction in actions against National banks to recover the penalty imposed upon such banks for taking usurious interest.

No bank in Pennsylvania can lawfully take more than six per cent interest.

The person paying usurious interest may recover twice its amount, although the principal is not paid.

In such suit the plaintiff may recover twice the entire amount of interest paid.

In such suit the defendant cannot set off a judgment held by it against the plaintiff.

BEFORE Sharswood, C. J., Mercur, Gordon, Paxson, Trunkey, Sterrett and Green, JJ.

Error to the Court of Common Pleas of Lebanon county.

Debt to recover twice the amount of usurious interest paid by the plaintiff to defendant on loans and discounts. The head-note and opinion show the case.

Grant Weidman and *C. P. Miller*, for plaintiff in error.

W. M. Derr, for defendant in error.

Trunkey, J. In the twenty-eight points presented to the court below and in the more than thirty assignments of error, no question is made but that the plaintiff paid and the defendant received a large amount of usurious interest. That fact was too patent to be gainsaid. The court submitted to the jury to find the amount of interest charged on the several loans and discounts, and if in excess of the legal rate, with instructions that there could be no recovery for usurious interest paid on any contract or note not declared upon. This submission, involving the merits of the case, is not specified among the alleged errors.

The numerous assignments do not present so many points, and some of these do not seem to be so material as to require remark. In passing it may be noted that the statutes in this State providing for amendments in pleadings are very liberal, even permitting

the courts to allow the filing of a declaration or plea after verdict, and these statutes have been liberally construed as remedial. When a declaration clearly sets forth the cause of action and the matters claimed, objections for defects in form will not avail as formerly.

The defendant denied the jurisdiction of the court. In *Bletz* v. *Columbia Nat. Bank*, 87 Penn. St. 87; 2 Nat. Bank Cas. 366; 30 Am. Rep. 343, it was decided that State courts have jurisdiction in an action by a borrower against a National bank, to recover back twice the amount of legal interest paid by the borrower to the bank and taken in violation of the National Bank Act. That was the point in the case. Since, the judgment has been repeatedly followed, without attempt to add to the reasoning of AGNEW, C. J., who supported it independently of the act of February 18, 1875, amending section 5198 of the Revised Statutes of the United States. No sufficient reason appears for departure from the authority of that case. Moreover, said amendment expressly gives jurisdiction in said action to the State courts, and as it is purely remedial, it might be construed to apply where the action accrued prior to its date as well as after.

The defendant asked instructions that the banks named in the special plea are banks of issue, under the laws of this Commonwealth, within the meaning of section 5197 of the Revised Statutes of the United States, to which the court answered: "It does not appear that the banks named are banks of issue, having the right to charge a rate of interest greater than six per cent per annum. And in fact and in law there is no bank of issue in Pennsylvania authorized to charge a rate of interest in excess of the legal rate." This ruling was in accord with the opinion of AGNEW, C. J., in *First Nat. Bank of Clarion* v. *Gruber*, 6 Nor. 468; 2 Nat. Bank Cas. 395, and with the subsequent decision of this court in the same case. 8 W. N. C. 119; 2 Nat. Bank Cas. 382; 87 Penn. St. 468. At the second trial nearly all the same charters were pleaded as in this case. It is not alleged that these banks ever did issue circulating notes. It was not the legislative intent that they should have that right. Until their charters were construed to give it by National banks, it was not suspected that such power had been granted. At the first session of the

Legislature after the National banks had set up this construction in court, a statute was enacted subjecting all banking corporations to the act of May 28, 1858, relating to interest for the loan or use of money. It was well to remove any ground for said fictitious claims, and in doing so no validity or sanction was given these which were previously made.

In answer to the defendant's twelfth and thirteenth points the jury were instructed that nothing in the statutes of this Commonwealth, relating to the rate of interest, authorizes banks to take, reserve or charge a rate of interest in excess of six per centum per annum. The statute provides: "The lawful rate of interest for the loan or use of money, in all cases where no express contract shall have been made for a less rate, shall be six per cent per annum." When a greater rate shall have been reserved or contracted for, the debtor shall not be required to pay the excess over the legal rate, and at his option he may deduct the excess from the amount of the debt, or when he shall have voluntarily paid the whole debt, with interest exceeding the lawful rate, he may recover the excess of interest by action. Act May 28, 1858, P. L. 622. This statute inflicts no penalties for charging or receiving unlawful interest, and it has been said that it is not unlawful for a debtor to pay, or a creditor to receive, more than the lawful rate, and that the man who agrees to pay more commits no violation of law, and is not bound to repudiate his contract. *Appeal of Second Nat. Bank of Titusville*, 85 Penn. St. 528; 2 Nat. Bank Cas. 364. It is strictly true that no violation of law is committed in the making of such contract, that will be followed by pains and penalties, or forfeitures; or that such contract will be deemed a fraud upon other persons; and the remarks were to the end that the taking of more than six per cent interest is not a fraud *per se* upon creditors. In another sense, the contract for a greater rate of interest than six per cent is in violation of law. In absence of a contract for a less rate, the plain letter of the statute is, six per cent per annum is the lawful rate of interest, and if the parties contract for a greater rate the contract is voidable as to the excess; the debtor need not pay the excess, and if he pay the excess voluntarily he may recover it back by action. The court was clearly right in the instruction as to the rate of interest banks may receive or charge on loans and discounts.

It is alleged that the court erred in refusing the defendant's points that no recovery can be had for the penalty under section 5198, unless the debt was also paid. The section is:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same."

"Two categories are thus defined, and the consequences denounced. 1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent, without interest, can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt, or suit in the nature of such action, against the offending bank, brought by the persons paying the same or their legal representatives." *Barnett* v. *National Bank*, 98 U. S. 555; 2 Nat. Bank Cas. 18. The terms of the statute are too plain for different constructions. If illegal interest be contracted for the debt shall bear no interest. If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest, when sued for the penalty, to chop round and call it a credit on the principal, would vitiate the vindicatory clause of the statute. In such case the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting. *Monongahela Nat. Bank* v. *Overholt*, 96 Penn. St. 327; *ante* 735. In Pennsylvania the statute authorizes the debtor, at his option, to deduct the excess of interest from the debt, or to pay the whole debt and unlawful interest, and then recover back the excess over the lawful. Such statutes and decisions under them throw no light on the question now pending.

It is urged that the court erred in refusing the defendant's point that no more can be recovered than twice the amount of

the interest paid in excess of the legal rate. The statute makes the receiving or charging "a rate of interest greater than is allowed" "a forfeiture of the entire interest." "In case the greater rate of interest has been paid" the debtor may recover back "twice the amount of interest thus paid." The bank may take or charge the "rate" allowed by the laws of the State where it is located, and if no "rate" is fixed by said laws, it may take or charge a "rate" not exceeding seven per centum. It is clear the word "rate" is used in the same sense throughout. The lawful rate, measure, is certain, and a greater rate, whatever it may be, is a fixed measure by agreement of the parties. The entire interest forfeited is just the rate which was contracted. Upon payment and receipt of a greater rate than is lawful, twice the amount thus paid is twice the rate, twice the entire interest. To say that the meaning is only a part of said greater rate, only the excess over the lawful rate, may be taken to measure the penalty, is a wrestling of the words. The defendant cites and relies on the case of *Hintermister* v. *First Nat. Bank of Chittenango*, 3 Hun, 345, where it was decided that only twice the amount paid in excess of the lawful interest can be recovered. Great weight is justly given to the decision of that court, but in this case we think its reasoning and conclusion are directly at variance with the statute. We adopt the ruling of DILLON, Circuit Judge of the United States, that the amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate. *Crocker* v. *First Nat. Bank of Chetopa*, 3 Cent. L. J. 527; 1 Nat. Bank Cas. 317.

In answer to the defendant's twenty-seventh point the court charged that there can be no set-off in this action. The plaintiff's claim is not in the Defalcation Act, which applies where the parties are "indebted to each other upon bonds, bills, bargains, promises, accounts or the like." It arises from the defendant's violation of a statute, remedial and penal, which gives the borrower the right to recover back from the bank twice the amount of legal interest paid, for the twofold purpose of compensation and example — the recovery being a recompense to the one and a punishment of the other. *Monongahela Nat. Bank* v. *Overholt, supra.* It was decided in *Barnett* v. *National Bank*, 98

U. S. 555; 2 Nat. Bank Cas. 18, that in an action on a bill of exchange, the defendant could not set off a claim for twice the amount of illegal interest he had paid the bank.; that his remedy for the wrong was a penal suit, and he could have redress in no other mode or form of procedure. That set-off is not allowed in such actions is well settled. When the prescribed action for recovery is debt, or action in the nature of debt, it gives no right of set-off. After the plaintiff shall have obtained judgment, if the defendant have a judgment against the plaintiff in another case, there is power in the court to order one judgment to be set off against the other, governed by equitable principles. But such principles do not apply in a suit where the claim is in the nature of a penalty for violation of a statute so as to allow defalcation.

Nothing need be added to the opinion of the learned judge of the Common Pleas, wherein he gave his reasons for denying the motion in arrest of judgment.

Judgment affirmed.

Guthrie v. Reid.

(107 Penn. St. 251.)

Judgment — opening. Usury — effect on note. Attorney's commissions.

A judgment creditor realized the amount of his demand from collateral security. The debtor notified him that the amount due was disputed, and required him not to apply the collateral to its payment until the amount was determined. The plaintiff, notwithstanding, applied the funds and satisfied the judgment of record. *Held*, that the defendant was entitled to have the entry of satisfaction struck off and be admitted to defend.

Where a National bank takes, receives or charges more than the legal rate of interest in the discount of a note, the interest-bearing power of the note is destroyed, and remains destroyed until it is paid.

Reid gave Guthrie a judgment note for the latter's accommodation. Guthrie procured it to be discounted by a National bank at a usurious rate of interest. *Held*, that defendant could avail himself of the usurious discounts charged by the bank as a defense to the payment of interest.

The reasonableness of an attorney's commission stipulated for in a judgment note is a question for the court, but if submitted to the jury and their verdict is reasonable it will not be disturbed.

A judgment confessed, having been opened on the ground that it had been overpaid by proceeds of collaterals, the order of court provided that the judgment note should stand as a *narr.*, and that "an issue is awarded to ascertain the amount due the plaintiff on this judgment January 7, 1881. And the amount of over-payment (if any) applied to the satisfaction of the same." *Held*, improper; the only proper issue was the amount due on the judgment.

A docket entry of a judgment not supported by the record, and which appears on its face to be a clerical error, will be stricken off by the Supreme Court.

BEFORE MERCUR, C. J., GORDON, PAXSON, TRUNKEY, STERRETT, GREEN and CLARK, JJ.

Error to the Court of Common Pleas of Clarion county.

The judgment was entered in the court below in the name of J. W. Guthrie, for use of First National Bank of Clarion against John C. Reid, upon a judgment note dated June 20, 1878, for $3,050, payable ninety days after date, with five per cent attorney's fees for collection, amounting in all to $3,202.50. On January 7, 1881, the judgment was satisfied and the following receipt entered on the docket:

"Received January 7, 1881, from the defendant, $3,633.94, in full of debt, interest and costs, money realized on Ralph Bagley note.

"G. W. ARNOLD, *Cashier.*"

The head-note and opinion show the case.

Judd & Wilson, for plaintiff in error.

B. J. Reid, *A. B. Reid* and *W. L. Corbett*, for defendant in error.

PAXSON, J. The court below was entirely right in opening the judgment held by the bank against John C. Reid. The satisfaction of the judgment after notice that the amount was disputed was improper, and if not corrected in some form, was calculated to work injustice to Reid, for the reason that when he should attempt to call the bank to account for the proper application of his collateral, the bank could say to him: "The judgment which we satisfied is conclusive upon you as to the amount due thereon. Nor do we see any breach on the part of Reid of the contract with the bank by which the proceeds of the Bagley

note were to be applied to the claims of the bank held against him. This judgment was not specified in said contract; it was doubtless included; but this did not justify the bank in applying more money on the judgment than was due thereon, especially in the face of a notice not to do so.

It is settled law that where a National bank takes, receives or charges more than the legal rate of interest in the discount of a note, the interest-bearing power of the note is destroyed. And when once so destroyed, it remains so. The taint of the usury clings to it until paid. It is a dead note thereafter, so far as interest is concerned. *Lucas* v. *Bank*, 78 Penn. St. 231; 1 Nat. Bank Cas. 872; *Bank* v. *Karmany*, 98 Penn. St. 65; *ante* 746. The rule thus indicated is a sound one. The object of the act of Congress is to punish National banks for such violation of the law. The obvious way to avoid the punishment is not to commit the offense.

It was urged however that Reid, the maker of the note, cannot avail himself of this defense because the illegal interest was paid by Guthrie, for whom the note appears to have been discounted The answer to this is that the bank, by its act, has destroyed the interest-bearing power of the note, and can recover no interest upon it from anybody. If this had been a suit by Reid to recover back interest paid by Guthrie, we would have had a different question, and *Bly* v. *National Bank*, 79 Penn. St. 453; 1 Nat. Bank Cas. 937, and other authorities cited by plaintiff in error, might have had some application.

What has been said we think sufficiently covers the first nine assignments of error. It was error however to submit to the jury the question of the amount of the attorney fee. It was settled in *Daly* v. *Maitland*, 7 Nor. 384, that this is a question for the court in the exercise of its equity powers, and is not a proper one for submission to a jury. We do not see however that any harm has been done by the submission in this particular instance, as the amount fixed by the jury is not unreasonable. We will not therefore reverse for this reason. But we point out the error that it may not be made a precedent.

Some minor errors have crept into the case which must be corrected. They are due in part to the fact that the order for the

issue was too broad. The issue itself was exceedingly informal and vague. The order provided that the note on which judgment was entered should stand as a *narr.*, and that "an issue is awarded to ascertain the amount due the plaintiff on this judgment January 7, 1881. And the amount of over-payment (if any) applied to the satisfaction of the same." The latter clause of the issue should have been omitted. The only proper issue was the amount due upon the judgment. That settled, the amount of over-payment becomes a mere matter of arithmetic, about which there could be no dispute, and which could not be properly determined in this proceeding.

The verdict of the jury followed the vice of the order. It was as follows:

"August 21, 1883. We find there was due the plaintiff on this judgment, January 7, 1881, at the date he applied a part of the proceeds of the collateral (Ralph Bagley) note, as follows:

On the debt	$3,000 00	$3,000 00
Att'y's commissions	63 00	63 00
Total am't of judgm't and att'y's com.		$3,063 00

"We find the excess of application applied by plaintiff to the payment of this judgment on January 7, 1881, to be $560.15."

The latter part of the finding we may reject as surplusage. The proper finding, viz.: the amount due on the judgment, is complete without it; and we can thus preserve all that is pertinent and valuable in the verdict.

The finding of "the excess of application" led to another blunder. Upon it the prothonotary has entered a judgment in favor of Jno. C. Reid in the sum of $560.15. There is nothing whatever upon the record to base such a judgment upon; it was probably an error in the officer who entered it, and it is a matter of some surprise that it was not corrected below. It doubtless would have been had it been called to the attention of the learned court. As it is a mere excrescence upon the record, we can correct it here.

The entry of August 21, 1883, purporting to be an entry of judgment in favor of John C. Reid for $560.15, is stricken from the record.

Subject to this modification the proceedings below are affirmed.

First National Bank of Clarion v. Brenneman's Executors.

(114 Penn. St. 315.)

Committee to appraise shares — power to correct mistake.

The committee provided for by the fifth section of act of Congress of July 12, 1882, to appraise the National bank shares of shareholders who do not assent to amendments to the articles of association, may correct a mistake made by them in their approval within thirty days therefrom.

BEFORE Gordon, Paxson, Trunkey, Sterrett, Green and Clark, JJ. Mercer, C. J., absent.

Error to the Court of Common Pleas of Clarion county. Debt brought by executors of the last will of Daniel Brenneman, deceased, against the First National Bank of Clarion, Penn. Said executors — owners of forty shares, par value $100 each, of the capital stock of said bank, total capital $100,000 — withdrew from said association on the execution of its charter.

A committee was appointed to appraise the value of said shares under section 5, act of Congress of July 12, 1882, which is as follows:

"That when any National banking association has amended its articles of association, as provided in this act, and the Comptroller has granted his certificate of approval — any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons; one to be selected by such shareholder, one by the directors, and the third by the first two, and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a re-appraisal to be made, which shall be final and binding, and if said re-appraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said re-appraisal, otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the shares so surrendered and appraised shall, after due notice, be sold at public sale within thirty days after the final appraisement provided in this section."

The committee made report. The plaintiffs tendered their certificates of stock and demanded payment which was refused, wherefore this suit was brought.

The affidavit of defense is stated in the opinion.

Judgment for want of a sufficient affidavit of defense for the amount fixed by the committee in their first report of April 1, 1885, with interest amounting to $8,135.99. The defendants took this writ.

James Breden (*Jenks & Reed* with him), for plaintiffs in error.

B. J. & D. B. Reid, D. E. Brenemun, for defendants in error.

GREEN, J. This action is founded upon the fifth section of the act of Congress of July 12, 1882, which provides for the appraisal, by a committee of three persons, of the National bank shares of shareholders who do not assent to amendments to the articles of association. No provision is made for constituting the appraisal a proceeding of any court, or for filing it in any office or with any public officer, or even directing that it shall be in writing, or that the parties shall be notified of it. The act does not provide that when the value has been ascertained and determined, it shall be a debt due from the bank to the shareholder, to be forthwith paid, and this is what makes it a cause of action. The committee are simply to appraise the value of the shares; they have no judicial functions, they hear no controversy, they render no judgment as upon a litigated cause, their proceedings are not of record, they are mere appraisers, and presumably inform the parties of the fact, and amount of their appraisement. For aught that appears in the act that information may be imparted verbally or in writing. If the shareholder is dissatisfied he may appeal to the Comptroller of the Currency, and that officer is directed to cause a re-appraisal to be made, which shall be final and binding. The act does not prescribe the time within which the appeal must be taken, but as it does direct that the shares shall be sold within thirty days after final appraisement, the right of appeal could not be exercised after the expiration of that time. In the present case the appraisers, on April 1, notified the parties in writing that they had appraised the shares at $198 per share, and on the 9th the owners notified the bank that they were satis-

fied with the valuation. On the 21st of April the appraisers again notified the parties that they had made a clerical error in computing the figures upon which their valuation was made, by twice adding the valuation of one of the assets, to-wit, the banking-house and furniture appraised at $23,604, and they corrected the mistake, which resulted in a corrected valuation of $173\frac{687}{1000}$ per share. No part of the valuation actually made was changed. The real figures which composed the aggregate of the appraisement remained the same, and the appraisers did nothing but remove a double valuation of the same item unintentionally and mistakenly made. It would be strange indeed if this could not be done. Technically there is not a solitary reason why it could not. The time for appeal had not expired. No judgment award, or decree had been entered or pronounced upon the appraisement they had made. Nothing in the act of Congress gave, at the time the correction was made, any quality of finality to the appraisement made. The party affected could still appeal if he desired. The mistake was corrected by the parties who made it. The work of correction was as much a part of the work of the appraisers as the appraisement itself. Nothing in the law under which they were acting took from them either their control of the subject-matter, or their power to correct their own mistakes, at the time they assumed to correct this mistake, and we know of no reason, legal, equitable or moral, why they should not be permitted to make the correction in question. The power to correct mistakes even in judicial proceedings is fundamental and inherent in all tribunals, and is constantly exercised in the daily practice of the courts. The right of the citizen to have mistakes corrected is so thoroughly established, and so well recognized, that it is an independent source of equitable jurisdiction and may also be enforced in courts of law. Thus money paid by mistake of fact may be recovered back by action at law. It is unnecessary to cite any of the numerous authorities in which it has been held that mistakes of arbitrators and referees may be corrected either by themselves or by the courts. The general principle is thus stated in Story Eq. Jur., §§ 1456 and 1456a. "In regard to matters of fact, the judgment of the arbitrators is ordinarily deemed conclusive. If however there is a mistake of a material

fact apparent upon the face of the award, or if the arbitrators are themselves satisfied of the mistake, and state it (although it is not apparent on the face of the award), and if in their own view it is material to the award, then, although made out by extrinsic evidence, courts of equity will grant relief," — citing many authorities. In Morse Arbitrations and Awards, p. 323, the writer says: "It is however clear that for an admitted mistake of the arbitrators, a court of equity will refer back an award;" and on pages 326 and 327, referring to mistakes in computation and clerical errors, he points out that they are not mistakes in their decision itself, but blunders in writing out the decision." He says: "The decision may be final, while the expression may be open to correction — to say that a court could not correct such 'blunder,' especially when acknowledged by the arbitrator, would, at least from a common-sense point of view, seem absurd. * * * As a general rule, the courts in the United States and sometimes also in England will find some way of correcting clerical errors, blunders in calculation, and the like."

There is nothing in *Speer* v. *Bidwell*, 8 Wright, 23, at all in conflict with these views when applied to a case like the present. That was an action upon an award made in pursuance of a submission, in which the parties agreed in writing to be absolutely bound by the award without any right of appeal. The evidence offered and received on the trial was all to prove misbehavior of the arbitrators. The only mistakes made or referred to in the opinion of this court were mistakes in the action of the arbitrators in hearing *ex parte* affidavits, and especially in allowing as proof an affidavit of one of the parties to the payment of a sum of $640 which had not been paid, and that the unsworn declarations of an interested witness were privately received. These things were pronounced misbehavior, and the court below was sustained in receiving testimony of these various matters in defense against the award. We are of opinion that the learned court below was in error in entering judgment for want of a sufficient affidavit of defense; and therefore

The judgment is reversed, and *procedendo* awarded.

Henderson v. Myers.

(11 Phila. 616.)

Compromise — opening.

A compromise of a suit by the receiver of a National bank and counsel for the United States will not be opened after a delay of seven years, no fraud being shown.

COMMON Pleas of Venango county, Penn. Rule to show cause.

Trunkey, P. J. This action was commenced on August 12, 1867. Hon. David Derickson was attorney of record for the plaintiff, and conducted the cause to its termination. March 23, 1869, the defendant presented a statement, praying, for reasons set forth, an order of compromise, under the provisions of the United States National Bank Act. Upon the statement was indorsed as follows: "I have read the foregoing statement, and being familiar with the facts, I assent to the application and the compromise it proposes; David Derickson, attorney for the United States." Thereupon the court made the following order: "Upon due consideration of the proposition of compromise made in this case, and of the facts therein set forth, admitted and assented to, the court adjudge and direct that the receiver may compound and settle the said suit, and the claims therein involved, on the terms prayed in the proposition and assented to by Hon. David Derickson, attorney for the United States, and also attorney in this case for Harvey Henderson, the plaintiff." On April 10, 1869, the following was placed upon the record: "Received $100, in consideration of which this case is compounded and settled as per the order of court, and the direction of the attorney for the United States, Harvey Henderson, receiver."

Thus the case stood till May 15, 1876, when Linus M. Price came and showed that he had been appointed successor to the plaintiff as receiver, and moved the court to set aside the order made on March 23, 1869, allowing a compromise, and the compromise made in pursuance thereof. At the same time Price made

similar motions in a number of other cases, wherein Harvey Henderson, receiver of the Venango National Bank, was plaintiff, in which like proceedings were had as in the one against James H. Myers. These actions were all brought to August term, 1867, and the larger portion of them were ended by orders of court and settlement and receipts of the receiver, on the same dates as in the *Myers Case*. One was settled and receipted August 6, 1869, to September 6, 1869, and the remaining three March 2, 1874. In some of the cases (the last one settled) Mr. Henderson indorsed written assent before the order was made. At the argument it was understood that the motions in the other cases should follow the disposition of the one directly under consideration. Under the rules of court no fact alleged in the affidavit of Mr. Price, not apparent of record, unless admitted or proved, can be taken as true. Hence a number of the allegations on which the motion is based cannot be considered in its support. For instance, the one that Harvey Henderson never willingly consented to the compromise, nor considered it right or just, is not proved. In passing we remark we know nothing of his character to induce belief that he willingly and silently, in violation of his official duty, suffered a wrong to be done by his own counsel, which in a few days thereafter he consummated upon the record over his own signature.

Some of the reasons and specifications present legal questions and facts of record. The first reason assigned in support of the motion is, because the court had no power to order such a compromise to be made. If this be true, and is a legal conclusion from facts apparent of record, the order is harmless; it is of no use to the defendant, nor injury to the plaintiff. If the court had no jurisdiction or power in the premises, as alleged in the specifications, it would be well to strike off the order. The court should strike off an attempted act not in its power to perform. Had the defendant pleaded to the declaration filed, interposed no such objection as set forth in the first and second specifications, after trial and judgment, I do not think the judgment would now be void or voidable. Nor am I of opinion that order of court and settlement are void for want of jurisdiction.

The second reason assigned is, because the said compromise was ordered upon the petition of defendant, assented to by David Der-

ickson, attorney for the United States. This is literally true, but the record shows that Judge Derickson was also attorney for the receiver, and that the receiver soon after completed the settlement. In the face of the record, can it be said that the receiver and his attorney did not assent? The act of Congress prescribes no form of procedure. The form adopted may be a fit subject for criticism, but it brought both parties on record assenting to the facts and with the compromise with the approval of the attorney for the United States. To say the receiver did not assent, or even join in the petition, is to stick to the letter and stop short of the spirit.

The third and last reason assigned is, the reasons set forth in the proposition of compromise were utterly irrelevant and immaterial, and many of the facts set forth in said proposition were utterly untrue. The two specifications of false statements of facts are: 1. "Because the government, through its officer, the plaintiff in this case, compounded and settled a large amount of the assets of said bank, to-wit, between $600,000 and $1,000,000 for nominal sums without the consent of the stockholders;" and 2. "The government of the United States is a large creditor of the said bank, and all the assets thereof, together with all that could be enforced against the shareholders, would not be sufficient to pay the amount due; and as it is entitled to be paid in full, no other creditor of the said bank can have any interest in the enforcement of said claim." The present receiver, not denying the large indebtedness of the bank more than all its assets to the United States, calls these two statements utterly untrue. The attorney for the United States said he was familiar with the facts, assented to the application and compromise, and the former receiver by his acts showed his assent. Mr. Henderson was himself a lawyer in good standing. He and Mr. Derickson well understood their duties and responsibilities in their respective positions and relations to this case. They did not consider facts utterly irrelevant and immaterial or false as assented to by them. As to mere matters of fact, what were admitted by the parties cannot be treated as untrue, unless so shown by record or other evidence. The statement of law that the United States government was entitled to be first paid had some color of truth, if not true. The

act of Congress of March 3, 1797, section 5, provided that where any

"person hereafter becoming indebted to the United States by bond or otherwise shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied."

That act applied to insolvent corporations as well as to natural persons. *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 102. The act is continued in force in the Revised Statutes of the United States. It never occurred to the eminent counsel that there was any thing in the National Bank Act, section 5236, which, by fair construction, excepted insolvent National banks out of the operation of the statute of 1797. Some do not appear to believe it yet. Some see no such positive repugnancy between the provisions of the two statutes that they cannot stand together, or be consistently reconciled. Unless there be such repugnancy there is no repeal by implication. Possible, having reference to the statute of 1797, the National Bank Act will admit of a reasonable construction, that preferred debts due the United States shall be first paid, and ratable dividends thereafter on other proved claims. The failure of the learned counsel to anticipate the construction since given by the officers of the United States is not enough to warrant imputing to the counsel bad faith.

In remarking upon the reasons assigned in support of the motion, we have endeavored to be as brief as to avoid expressing an opinion in defense of the action of the court in making the order. Its propriety and legality ought to be left to rest upon the record. The question is, whether, after the lapse of nearly nine years from the bringing of the suit, and more than seven years after its settlement, sufficient cause has been shown for setting aside the order. Where judgment has been duly obtained adversely upon a verdict the lapse of a term puts it beyond the power of the court to open or strike off that judgment. Although this rule does not apply to judgments in default, nor by confession, yet it is a familiar principle that the longer the delay the stronger must be the reason to move the court to open or strike off such judgments. Especially ought a case to be strong to justify setting aside a settlement where no fraud or imposition has been shown.

The order allowing a compromise of this case was made at the same time as like orders were made in other cases. Similar orders were made at subsequent dates. All was done in open court, and in the town where the bank was located. No creditor, in person or by counsel, at the time or subsequently, appeared and asked to be heard in suggesting a doubt of the propriety of the compromise. The receiver, who now comes and questions the matter, alleges no fraud, alleges no bad faith except on the part of the former receiver, and of that he offers no evidence, and does not deny that David Derickson was attorney for the United States as he professed to be. He is distinguished for ability and experience. At this late date, after the action of the court upon facts and statements agreed upon by the parties, deemed sufficient by the able counsel then representing the United States, so long unquestioned by any interested party, where there is no pretense that there was actual fraud, in our opinion, sufficient cause does not appear to warrant striking off the order and the compromise.

INDEX.

ACKNOWLEDGMENT.

See DEED, 518.

AFFIDAVIT.

Under Procedure Act.] Where a National bank sues under the Procedure Act of 1864, chapter 6, the cashier may make the affidavit required to be filed with the declaration, stating the true amount that the defendant is indebted to the plaintiff over and above all discounts. *Parkhurst* v. *Citizens' National Bank of Baltimore*, 468.

AGENCY.

Broker — implied authority to pledge stocks — tender.] Moller & Co., brokers and agents for Hunt, by an absolute power of attorney, having authority from her to pledge her stocks for a loan of $35,000, contracted with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for Hunt, and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. *Held*, that defendant could not hold the same as security for other loans made by it to M. & Co. Plaintiff tendered before suit the $35,000 and interest, and on this being refused, tendered $46,000. *Held*, not a conclusive admission that defendant had a lien for the latter sum. *Talmage* v. *Third National Bank of the City of New York*, 608.

APPEAL.

1. *Jurisdiction — practice.*] Where a suit is brought in the United States court by one in his individual name, as president of a National bank, and the whole record shows that the suit was treated by both parties as that of the bank, and not of the individual, the defendant will not be allowed on final hearing, to assert for the first time that the individual and not the bank was the complainant. *Fortier* v. *New Orleans National Bank; New Orleans National Bank* v. *Fortier*, 140.

2. *Record — review of evidence.*] An appeal from an order of reversal, which does not state that the reversal was upon questions of fact, brings up for review only questions of law. A finding of fact by the trial court upon sufficient evidence, and not reversed by the General Term, is conclusive on appeal to the Court of Appeals. *Prosser* v. *First National Bank of Buffalo*, 646.

See JURISDICTION, 52.

ASSIGNOR.

Of stock.] *See* TAXATION.

ATTACHMENT.

1. *Against insolvent bank — repeal.*] An attachment issued against an insolvent National bank is invalid (U. S. R. S., § 5142), and is not made valid by the subsequent acquisition by the bank of further capital. Although the bank after the issuing of the attachment paid a large amount of its debts in full, this does not estop it from questioning the validity of the attachment. The provision of the National Banking Act prohibiting attachments in such cases is not repealed by the act of Congress of July 12, 1882, providing that the jurisdiction for suits thereafter brought against National banks shall be the same as for suits against State banks, and repealing laws inconsistent therewith. *Raynor* v. *Pacific National Bank*, 624.

2. *Jurisdiction.*] An attachment from a State court may not issue against an insolvent National bank of that State. *National Shoe and Leather Bank of the City of New York* v. *Mechanics' National Bank of Newark, N. J.; Corn Exchange Bank* v. *Same; West Side Bank* v. *Same*, 601.

3. *Before judgment — Federal jurisdiction — unlawful attachment — bond for property — validity — action to set aside bond — equity — jurisdiction.*] Under U. S. Revised Statutes, section 5242, providing that no attachment before final judgment shall be issued in any State court against a National bank, and U. S. Revised Statutes, section 915, entitling the plaintiff in actions in the Federal courts to similar remedies by attachment to those provided by the laws of the State in which such courts are held, a Federal court may not issue a writ of attachment before final judgment against a National bank. A bond given to release property from an illegal attachment is void. The principal in a bond given in an attachment suit may maintain an action in equity to have the bond declared void and the property held by the sureties as indemnity returned. *Butler* v. *Coleman; Same* v. *Mixter; Same* v. *Whitney; Same* v. *Demmon*, 291.

See INSOLVENCY; JURISDICTION, 350, 670.

ATTORNEY.

Commissions.] The reasonableness of an attorney's commission stipulated for in a judgment-note is a question for the court, but if submitted to the jury and their verdict is reasonable it will not be disturbed. *Guthrie* v. *Reid*, 751.

BANKRUPTCY.

Suit by assignee for penalties for taking usury.] Plaintiff as assignee in bankruptcy of A. sued to recover the penalties imposed by the National Banking Act for charging and receiving usurious rates of interest. Defendant proved a release and discharge, executed by A. before the commencement of the bankruptcy proceedings. Plaintiff gave in evidence the record of a judgment in his favor in an action in which he as assignee sued defendant to recover a payment of a debt made to it by A. about a month prior to the execution of the release, as having been made when A. was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the Bankrupt Act. *Held*, that defendant was not concluded or affected by the judgment. *Getman* v. *Second National Bank of Oswego*, 599.

BROKER.

See AGENCY, 603.

CASHIER.

Liability for negligence in discounts — limitation of loans to single person or firm.] The by-laws of plaintiff, a National bank, directed that there should be "a standing committee known as the exchange committee, consisting of the president, cashier and one director," having power to discount bills, etc., who were required to report at each meeting of the board of directors. The cashier was empowered, with the assent of the president, to "make discounts of an ordinary character." When the committee was not in session, such discounts were to be reported at its next meeting. No such committee was ever appointed. A discount committee of directors was appointed by the board, also an advisory and executive committee, but neither ever held a meeting. In January, 1873, plaintiff's president announced to the board of directors that he could not thereafter actively perform the duties of his office, and requested the appointment of a committee to examine, from time to time, its financial condition. Such a committee was appointed, with directions to investigate "three or four times each year." Thereafter the president took no active part in the business. Defendant, plaintiff's cashier, with the knowledge and at least tacit consent of the president and directors, discounted certain drafts, the drawers and drawees of which, at the time of the discounts, possessed the highest degree of commercial credit, but before the maturity of the paper became insolvent. *Held*, that in the absence of any claim of want of integrity, judgment or skill on his part, he was not liable. By another of plaintiff's by-laws, the names of two responsible persons were required upon discounted paper, the name of a firm being considered as one person. The drafts in question were drawn by the firm of P. & Co. upon W. & Co., both being composed of the same members. The business of the two firms was separate and distinct. The former bought and manufactured lumber, at Oswego, shipping it to W. & Co., at Albany, for sale. The latter firm was also consignee for other parties, selling on commission. *Held*, that defendant was not liable for loss by approving such paper for discount. The drafts in question came within the exemption in the National Banking Act (§ 29), of *bona fide* bills of exchange, drawn upon actually existing values, from the prohibition against loans by National banks to a single person or firm, in excess of one-tenth of its capital. It could not be assumed that W. & Co. were not, at the time the drafts were discounted, in receipt of property from P. & Co., sufficient to meet their requirements. *Second National Bank of Oswego* v. *Burt*, 609.

CERTIFICATE OF DEPOSIT.

1. *Power to issue — purchase by trustee — evidence — custom.*] A certificate of deposit issued by a National bank, payable to the order of the depositor, on return of the certificate properly indorsed, and understood between the bank and the depositor not to be payable until a future day agreed upon, is not in violation of the National Banking Act. The purchase, by a trustee, with the trust funds, in good faith, of a certificate of deposit, payable

CERTIFICATE OF DEPOSIT — (*Continued*).

at a future day, issued by a National bank, the stock of which was selling at par, and occasionally at a small premium, and which was issuing large numbers of such certificates to individuals, savings banks and trust companies, will not render the trustee liable for a loss arising from the failure of the bank before the day stipulated for the payment of the certificate. In such a case, evidence is admissible to show that at and about the time of such investment, the bank issued large numbers of such certificates to individuals, savings banks and trust companies; and the evidence of bank examiners, that it is not usual for National banks to issue such certificates, is also admissible. *Hunt, Appellant*, 474.

2. *Ultra vires — embezzlement.*] A National bank by its cashier issued its certificate of deposit for money to be paid on a note of the depositor, or lent for his use. *Held*, that the bank was liable thereon although the cashier embezzled much more of the bank's funds. *First National Bank of Monmouth* v. *Brooks*, 387.

CHANGE FROM STATE BANK.

Guaranty.] A National bank, changed from a State bank, may maintain an action on a continuing guaranty for loans, held by it before the change, for loans both before and after the change. *City National Bank of Poughkeepsie* v. *Phelps*, 627.

CHECKS.

Certification of.] A National bank agreed to honor a depositor's checks in consideration of collaterals, and subsequently certified such checks for the benefit of anticipated holders; *held*, that the validity of the debt created by paying the checks is not affected by U. S. R. S., § 5208, declaring it unlawful for National banks to certify any check unless the drawer have the amount thereof on deposit. *Thompson* v. *St. Nicholas Nat. Bk.*, 663.

COLLATERAL SECURITY.

Fraudulent certificate of stock in National bank — action against bank.] A. lent money to B. for his own use on B.'s false representation that he owned and had transferred to A. a certificate of stock to an equal amount in a National bank of which B. was cashier, and received from him such a certificate, written by him in one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, certifying that A. was the owner of that amount of stock, "transferable only on the books of the bank on the surrender of this certificate," according to its by-laws. B. did not deliver any certificate to the bank, or make any transfer to A. upon its books. He never repaid the loan and was insolvent. The bank did not ratify or receive any benefit from the transaction. *Held*, that A. could not maintain an action against the bank to recover the value of the certificate. *Held*, also, that the action could not be maintained by mere evidence of one or two other similar instances of issues of stock by B. without the surrender of any certificate, and that shares once owned by B. and pledged by him to other persons before the issue of the certificate to A., were afterward transferred to the president, with the approval of the directors, to secure a debt due from B. to the bank. *Moores* v. *Citizens' National Bank of Piqua, Ohio*, 110.

COMMITTEE.

To appraise shares — power to correct mistake.] The committee provided for by the fifth section of act of Congress of July 12, 1882, to appraise the National bank shares of shareholders who do not assent to amendments to the articles of association, may correct a mistake made by them in their approval within thirty days therefrom. *First National Bank of Clarion* v. *Brenneman's Executors*, 755.

COMPROMISE.

Opening.] A compromise of a suit by the receiver of a National bank and counsel for the United States will not be opened after a delay of seven years, no fraud being shown. *Henderson* v. *Myers*, 759.

CONFLICT OF LAWS.

See USURY, 25.

CONSPIRACY.

Procuring declaration of dividend — common-law offenses.] In an indictment for conspiracy under U. S. Revised Statutes, section 5440, the charge of conspiracy cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the conspiracy. A conspiracy entered into between the directors of a banking association to misapply the moneys of the association by procuring the declaration by the association of a dividend greater than the net profits, in violation of section 5104 of the Revised Statutes, is not a criminal offense against the United States. *United States* v. *Britton*, 104.

CONSTITUTIONAL LAW.

Service on surety of non-resident.] The provision of Code of Georgia, § 3854, that in a suit on an attachment bond, service of notice on the resident surety is service on his non-resident principal, is not unconstitutional. *Continental National Bank* v. *Folsom*, 850.

See TAXATION.

CONTRACT.

1. *Assumption of another's obligation — failure of consideration.*] On foreclosure of a deed of trust upon a leasehold interest executed by an association to secure its debts, B. & T. became the purchasers. As payment of the purchase-money they assumed the debt, and by way of indemnity to certain sureties of the association, they executed a mortgage in their favor. At this time the leased property was subject to a deed of trust which was subsequently foreclosed, whereby the leasehold interest was extinguished. B. & T. bought with knowledge of this deed of trust and without warranty of title to the leasehold, and no fraud or deceit was practiced on them. *Held*, that as between them and the sureties whom they had indemnified, the liability of the latter had not been revived, and they had a right to claim the benefit of the mortgage B. & T. had given them. *Thornton* v. *National Exchange Bank*, 518.

2. *Not to sue — consideration — payment of interest.*] An agreement not to sue a promissory note which is due, in consideration of the agreement, by the

CONTRACT — (*Continued*).

purchaser of land mortgaged to secure it, to pay at the end of each year, interest not exceeding the rate provided for by the note, is without consideration, and suit invalid. *Holmes* v. *Boyd*, 414.

DAMAGES.

Profits of speculation.] Defendant, contrary to a resolution of plaintiff's board of directors, discounted his own notes, using the proceeds in the purchase of wheat on speculation. When the transaction came to the knowledge of the directors they immediately removed defendant from his office. Defendant thereafter deposited with plaintiff a sum sufficient to pay said notes, declaring at the time to the officers of the bank that the deposit was for that purpose. They accepted the money, but refused to deliver up the notes or to return the money. The wheat was sold, after the commencement of this action, for a profit. *Held*, that plaintiff was not entitled to the profits. *Second National Bank of Oswego* v. *Burt*, 609.

DEDUCTIONS.

See TAXATION.

DEED.

1. *Date — delivery.*] The date of a deed is *prima facie* evidence of the time of its delivery. *Turner* v. *First Nat. Bank of Madison*, 408.
2. *Husband and wife — acknowledgment.*] Where husband and wife are named at the commencement of a deed as parties of the first part, and afterward the parties of the first part are named as grantors, the instrument is the deed of both husband and wife. Where a certificate of acknowledgment of a deed executed by husband and wife to convey lands of the wife states that the wife, upon separate examination, acknowledged that she executed the deed and relinquished her dower in the lands, the deed will pass her fee-simple interest. *Thornton* v. *National Exchange Bank*, 513.

DEPOSIT.

1. *Special — liability for — negligence — evidence — demand.*] National banks may accept special deposits. Where a National bank has been accustomed to receive United States bonds as special deposits gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value. A demand of said bonds, and a refusal by the bank to deliver the same, with no other explanation of such refusal than the statement that the bank has no such bonds in its possession, furnish sufficient proof of loss by such negligence as will render the bank liable therefor. *Bank* v. *Zent*, 698.
2. *Loss by burglary — negligence.*] Where a National bank was broken into by burglars, and property belonging to it and to others was taken therefrom the bank may take measures to recover its own; and it may lawfully undertake to act also for others thus jointly concerned with itself; and want of proper diligence, skill, and care in the performance of such an undertaking would render it liable to respond in damages for failure. The evidence examined, and *held* not sufficient to require its submission to the jury. *Wylie* v. *Northampton Nat. Bank*, 188.

DIRECTORS.

1. *How to act.*] To bind a National bank, the directors must act together as a board; their separate individual assent is ineffectual. *First National Bank of Fort Scott* v. *Drake*, 445.

2. *Negligence — action for — parties — leave to sue — jurisdiction.*] An action may be brought by a receiver of a National bank against its directors to recover damages sustained by their gross negligence. If the receiver is one of the directors, such action may be maintained by the stockholders, or when they are numerous, by one or more in behalf of all. It is not necessary to allege in the complaint a direction from the Comptroller, or a demand upon him and a refusal to direct the receiver to bring the action, or a refusal of the receiver to sue. Such an action may be brought in a State court. The bank, and the receiver, as such, are necessary parties defendant to such an action. *Brinckerhoff* v. *Bostwick*, 591.

See FRAUD.

DISSOLUTION.

A National bank in voluntary liquidation may still sue and be sued by its name for the purpose of closing its business, and a creditor may maintain a suit upon a disputed claim although he has filed a bill under the act of June 30, 1876, section 2, to enforce the individual liability of shareholders. *Central National Bank of Baltimore* v. *Connecticut Mutual Life Insurance Company*, 20.

EMBEZZLEMENT.

Indictment — willful misapplication — aiding cashier to embezzle — scienter — abstracting funds — alleging organization.] Under the Revised Statutes of the United Statutes, section 5209, punishing the *president*, cashier or *agent* of any National bank who shall embezzle or willfully misapply any of its funds, an indictment charging the defendant with committing the offense charged as *president and agent* is good. Under that statute an indictment charging that the funds alleged to have been embezzled were at that time in the possession of the defendant as president and agent is good, and it is not necessary to allege that they had *previously been intrusted* to the defendant. An indictment charging the president of the bank with aiding and abetting one alleged to be cashier to misapply the funds of the bank, need not charge that the president knew that such person was cashier. Under the word "abstracts" in this statute, the offense of abstracting the funds of the bank need not be described in an indictment for the abstracting by the words used to describe larceny. An indictment under the statute charging one with the offense as president of a certain National bank, "duly organized and doing business at the village of," etc., sufficiently states the organization under the National Banking Act. *United States* v. *Northway*, 199.

See JURISDICTION, 501.

EQUITY.

Jurisdiction — liability — married women as stockholders of insolvent bank. A bill to enforce against the separate estate of a married woman an assessment upon shares of National bank stock, is not open to the objection that

EQUITY — (*Continued*).

it does not allege that she had capacity to become a stockholder, whether she became such before or after marriage, where it alleges that she was the owner of the shares, and where a statute of the State in which the bank is located (Dig. St. Ark. 1874, § 4194), provides that a married woman may transfer her property, carry on any business and perform any services on her separate account, and that her earnings shall be her separate property, and may be used or invested by her in her name. The bill alleging that the married woman is possessed of property in her own right sufficient to pay the assessment, and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee or executor, the case is one of equitable cognizance. *Bundy* v. *Cocke*, 316.

ESTOPPEL.

Ratification — investing in securities contrary to law.] Where the cashier of a bank purchases bonds without authority of the bank, afterward appropriates them to his own use, it is estopped to deny the authority of the cashier. Where one sells bonds to a National bank at a certain price, the bank agreeing to resell them to the vendor at the same price or less, but refuses to resell them, *held*, in a suit for the breach of contract, that the bank may not deny its authority to buy the bonds. *Logan County Nat. Bank* v. *Townsend*, 448.

See LIQUIDATION, 401; PLEDGE, 96.

EVIDENCE.

1. *Deposition.*] Depositions were taken in obedience to a rule of court in the presence of the parties, and the witnesses were cross-examined. The justice of the peace certified "that the above witnesses were duly qualified and examined at the time and place stated in the caption before me." *Held*, (1) that it is *prima facie* presumed that the depositions were properly reduced to writing and subscribed by the witnesses; and it was not error to admit them; (2) that no objection to the absence of the signature having been made in the court below, the point could not be raised in this court. *Winton* v. *Little*, 725.
2. *Memoranda to refresh memory.*] Memoranda to refresh the memory of a witness must have been made recently after the fact in regard to which he testifies. Memoranda prepared by the attorneys of the witness several months after the occurrence of the facts testified to, from other evidence in possession of the witness, are not admissible to refresh his memory. *Schuyler National Bank* v. *Bollong*, 561.
3. A personal letter written by defendant, containing statements as to his financial relations with the bank, was properly excluded when offered by him. *Corcoran* v. *Batchelder*, 491.

EXCESSIVE LOANS.

See CASHIER, 609.

EXECUTOR.

Agreement — construction — statute of limitations — fraud.] After a mortgage creditor had, in two actions, obtained decrees for sales of the mortgaged premises, the judgment debtor died intestate. The will gave power to the executor to sell lands to pay debts. The holder of the decrees and the executor agreed that the latter might sell the mortgaged lands under said power — he promising to pay said decrees in full out of the proceeds, or out of other assets of the estate as preferred claims. The executor sold the lands for more than was due under the decree; paid nothing on the decrees; paid out and distributed the entire estate to others, and died. In an action by the holder of said decrees against the executor's estate: *Held*, (1) said agreement in effect "allowed" the decrees as valid claims against the estate of the mortgage debtor; (2) the holder of the decrees had a specific interest in so much of the purchase-money received by the executor as equaled the sum due on the decrees; and under the agreement, held a like interest in the other assets of the estate, as soon as the executor applied said purchase-money upon other debts; (3) as soon as the executor, by parting with those assets to others, made it impossible to pay said decrees out of his testator's estate, he became individually liable to the holder of said decrees; (4) such act by the executor was a fraud upon the holder of the decrees, and no statute of limitation could begin to run in his favor until said creditor had notice of the act. *Bank* v. *McIntire*, 707.

EXEMPTION.

See TAXATION.

FALSE AFFIDAVIT.

Oath — notary — indictment.] Before the passage of the act of February 26, 1881, notaries public in the several States had no authority to administer to officers of National banking associations the oath required by section 5211, Revised Statutes, and an indictment against an officer of a National bank under section 5292 for a willfully false declaration or statement in a report made under section 5211, so verified, would not lie. *United States* v. *Curtis*, 91.

FALSE ENTRIES.

Sufficiency of indictment.] In an indictment of an officer of a National bank, under R. S., section 5209, for making false entries in a book, report or statement of such association, with an intent to injure and defraud the association, or deceive an agent appointed to examine the affairs of such association, it is not necessary to aver that the false entry was made "in an account of and in due course of the business of the bank." *United States* v. *Britton*, 76.

FORGERY.

See JURISDICTION, 372.

FRAUD.

1. *Insolvency—rescission.*] Where one deposits a draft with a National bank, and the bank sends it to an agent for collection, who collects it, and the bank fails before receiving the avails, having been insolvent at the time

FRAUD — (*Continued*).

of the deposit, the depositor may rescind the transaction for fraud and recover the avails from the agent. *Craigie* v. *Smith*, 679.

2. *Of directors—unauthorized advances—recoverable by the bank—depository of the city money — frauds of city officials.*] Where a National bank, which is a depository of the funds of a municipality, acting by its president, makes in absolute good faith and in pursuance of a custom of the banks of the city, advances not authorized by law to a commission for building a court-house, upon checks regularly drawn and indorsed, and the Legislature, by a subsequent act, authorizes the repayment of such advances, the bank can recover the full amount with interest, although a part of the money so advanced was fraudulently misappropriated by certain of the city officials who were also directors in the bank. *Mayor, etc., of New York* v. *Tenth National Bank*, 655.

See EXECUTOR, 707; OFFICERS.

GOOD WILL.

See LIQUIDATION, 401.

GUARANTY.

By bank of contract between third persons.] No action may be maintained against a National bank upon a contract made by its cashier on its behalf, to guarantee a contract between third persons for delivery of building materials. *Norton* v. *Derby National Bank*, 568.

See CHANGE FROM STATE BANK, 627.

HUSBAND AND WIFE.

See DEED, 518.

INCREASE OF CAPITAL.

Conditional subscription — recovery.] The directors of a National bank voted to increase the capital stock "to $1,000,000," and that the stockholders "have the right to take new stock at par to an equal amount to that then held by them." No subscription books were opened, and the plaintiff did not subscribe for any of the new stock, but paid the bank a sum equal to the amount of stock then held by her, taking a receipt therefor "on account of subscription to new stock." The new stock subscribed for and paid in did not amount to enough to make the capital stock $1,000,000, and the directors then voted that the capital stock be increased by the sum paid in. The Comptroller of the Currency was notified that the capital stock of the bank had been increased to that extent, and he issued a certificate authorizing the bank to carry on business with that amount of capital stock. The amount paid in, as above, was used by the bank in its general business, and lost within a month after the certificate was issued, the bank having suspended. The plaintiff demanded back the amount paid in by her. *Held*, that she was entitled to recover it, with interest from the date of her demand. *Eaton* v. *Pacific National Bank*, 483.

See STOCK.

INJUNCTION.

See JURISDICTION; TAXATION, 9.

INSOLVENCY.

1. *Act of — attachment.*] The defendant, a National bank at Boston, Mass., on November 18, 1881, closed its doors, and was put in charge of a government bank examiner, and thus continued till March 14, 1882, when the Comptroller allowed it to resume. It transacted business till May 22, 1882, when it was placed in the hands of a receiver. An attachment was issued in this action, Nov. 19, 1881, against defendant's property in this State. At that time its assets would have paid its debts and liabilities exclusive of its capital, but it had refused to pay various legal obligations then due. *Held*, that defendant had committed acts of insolvency, within U. S. R. S., § 5242, and the attachment should be vacated. *Market National Bank of New York* v. *Pacific National Bank of Boston*, 672.

2. *Evidence of incumbrance.*] A statement in the inventory of an assignee in insolvency that certain stock therein inventoried was "valued at nothing above incumbrances," is not evidence that the assignor incumbered the stock by a pledge to any particular person, and therefore is no evidence for such person to establish a claim to an incumbrance thereon in his favor. *Delaware, Lackawanna and Western R. Co.* v. *Oxford Iron Co.*, 582.

3. *Indorser — set off of deposit.*] In an action by the receiver of an insolvent National bank against the indorser of a promissory note maturing after his appointment, the defendant cannot set off a deposit in the bank. *Stephens* v. *Schuchmann*, 540.

4. *Payment of creditors by Comptroller — adjudicated claims — amount, how determined.*] The payment of a creditor of an insolvent National bank by the Comptroller, under section 5236, U. S. Revised Statutes, must be based on the amount due on the adjudicated claim at the date of the failure, and not on the amount due when the claim is adjudicated. *United States, ex rel. White*, v. *Knox*, 128.

5. *Preference.*] The Pacific Bank of Boston, not being a member of the clearing-house, used to deposit with the Security Bank all checks received by it to be collected through the clearing-house, and was credited by the latter bank as a depositor. The directors of the Pacific Bank, having one Saturday, after closing, determined to go into liquidation, dispatched a committee to Washington to confer with the Comptroller of the Currency as to the appointment of a receiver. The appointment was made about ten A. M., on Monday. Monday morning the cashier of the Pacific Bank sent the checks and drafts received by mail to the Security Bank, and with them his check for the whole amount of the bank's deposits, for which he received a negotiable certificate of deposit of the Security Bank. The latter at the time held the Pacific Bank's negotiable certificate of deposit. The transaction occurred about half-past nine A. M., when no officer of the Security Bank knew or suspected that the Pacific Bank was insolvent. *Held*, that the cashier must have presumed that the Security Bank still held its certificate of deposit, and that in sending to it the checks and drafts, he was making a transfer which necessarily gave a preference, and was void under U. S. R. S., § 5242, and the Security Bank

INSOLVENCY — (*Continued*).

therefore could not set off the Pacific Bank's certificate of deposit against its own. *National Security Bank* v. *Butler*, 320.

6. *Rights of United States as creditor.* The provision of U. S. R. S., § 3466, that "whenever any person indebted to the United States is insolvent the debts due to the United States shall be first satisfied" does not apply to an insolvent National bank. The United States may not claim a payment of their demand against a National bank out of surplus moneys remaining in the treasury of the proceeds of bonds deposited as security for the circulating notes of the bank. *Cook Co. Nat. Bk.* v. *United States*, 68.

7. *Transfer of securities after.*] Baldwin, one of the executors and the general financial manager and custodian of the securities of an estate, and also the cashier of a National bank, purchased four accepted bills of exchange. To pay for them he drew his check as executor, on the deposit in the bank to the credit of the estate, and placed in the box containing the papers of the estate, usually kept in the cashier's desk in the bank, the drafts with this memorandum attached: "Est. W. James, loan $25,000, Oct. 26, 1881. C. Nugent & Co." The proceeds of the drafts were applied to the drawer's indebtedness to the bank. The bank failed and the defendant was appointed receiver. He gave to the executors the box and all its contents except the drafts, which he kept, claiming that they were the assets of the bank. He refused to deliver them on demand, and collected them at maturity, but kept the proceeds separate. *Held*, that Baldwin, in the purchase of the drafts, acted as agent of the drawers, and as executor and not as cashier, and though Baldwin knew at the time that the bank was insolvent, yet the transaction being a *bona fide* purchase and not a plan to secure preference of the estate over other depositors, was not in violation of section 5242 of the Revised Statutes of the United States, which forbids the transfer of any bills of exchange, etc., owing to any National bank * * * after the commission of any act of insolvency, or in contemplation thereof; and further that this court has jurisdiction to follow the proceeds of the drafts as trust property so long as they are identifiable, and to decree their payment to the estate. *Tuttle* v. *Frelinghuysen*, 576.

See JURISDICTION; STOCKHOLDERS.

INTEREST.

1. *Agreement on rate.*] Under U. S. R. S., § 5197, and California Civil Code, § 1918, the National banks in California may charge and receive such rates of interest as may be agreed upon. *Hines* v. *Marmolejo*, 338.

See USURY.

JUDGMENT.

1. *Collateral impeachment.*] An auditor appointed to distribute the proceeds of a sheriff's sale may not go behind a judgment regularly entered upon adverse proceedings without fraud and collusion. *Appeal of Second National Bank of Titusville; Henderson, to use of Second National Bank of Titusville*, v. *Waid*, 740.

JUDGMENT — (*Continued*).

2. *Opening.*] A judgment creditor realized the amount of his demand from collateral security. The debtor notified him that the amount due was disputed, and required him not to apply the collateral to its payment until the amount was determined. The plaintiff, notwithstanding, applied the funds and satisfied the judgment of record. *Held*, that the defendant was entitled to have the entry of satisfaction struck off and be admitted to defend. A judgment confessed, having been opened on the ground that it had been overpaid by proceeds of collaterals, the order of court provided that the judgment note should stand as a *narr.*, and that "an issue is awarded to ascertain the amount due the plaintiff on this judgment January 7, 1881. And the amount of over-payment (if any) applied to the satisfaction of the same." *Held*, improper; the only proper issue was the amount due on the judgment. A docket entry of a judgment not supported by the record, and which appears on its face to be a clerical error, will be stricken off by the Supreme Court. *Guthrie* v. *Reid*, 751.

3. *Proof of — assignee of sheriff's certificate of sale of lands — title in stranger.*] In a suit by the purchaser at execution sale to recover lands so purchased from the execution defendant, the judgment entry is sufficient proof *prima facie* of the judgment, and the admission of the pleadings is harmless error. In such suit the defendant may not prove title in a stranger, as against the assignee of the sheriff's certificate, who receives the sheriff's deed thereon. *Turner* v. *First National Bank of Madison*, 408.

JUDICIAL NOTICE.

See TAXATION, 449.

JURISDICTION.

1. *Action on attachment bond.*] A National bank may be sued in a State court on an attachment bond. *Continental National Bank* v. *Folsom*, 350.

2. *Appeal — denial of title, right or privilege.*] To give this court jurisdiction on appeal from a State Supreme Court under the National Banking Act, the "title, right, privilege or immunity specially set up or claimed" must be claimed by the plaintiff in error for himself, and not for a third person, in whose title he has no interest. *Miller* v. *National Bank of Lancaster*, 52.

3. *Attachment.*] A receiver of a National bank situated in another State, though not a party, may move to vacate an attachment. In an action against a National bank of another State, an attachment issued against its property in this State will be vacated upon proof of its insolvency. *People's Bank of the City of New York* v. *Mechanics' National Bank of Newark*, 670.

4. *Embezzlement.*] State courts have no jurisdiction of the offense of embezzlement of the funds of a National bank. *People* v. *Fonda*, 501.

5. *Penal actions.*] Actions and proceedings against any National bank may be brought in any State, county or municipal court in the county or city in

JURISDICTION — (*Continued*).

which such association is located, having jurisdiction in similar cases, to enforce a penalty under U. S. R. S., § 5198. *First National Bank of Tecumseh* v. *Overman*, 556.

6. *State courts in forgery.*] Defendant, a book-keeper in a National bank, without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. *Held*, on an indictment for forgery, that the crime was within the jurisdiction of the State courts. *Hoke* v. *People*, 372.

7. *Suit to restrain tax. Taxation — injunction — deductions.*] In an action by a National bank against the State tax officers, in behalf of its shareholders, to enjoin the collection of a State tax on the shares of the bank alleged to be unlawful on the ground that indebtedness was not deducted, *held*, (1) that such a suit was maintainable; (2) that an injunction would lie in behalf of a shareholder who was entitled to a deduction and who had made the affidavit and demand therefor required by the State law; and (3) it being clearly shown that an affidavit and demand would have been unavailing, that shareholders might be permitted to show in the action the deductions to which they were entitled and the collection of the amount of such deductions would be enjoined. *Hills* v. *National Albany Exchange Bank*, 45.

8. *Supreme Court of United States — certificate of division of opinion.*] The judges of the United States Circuit Court may certify a division of opinion as to whether "either of the counts of the indictment charges the defendant with an offense under the laws of the United States." *United States* v. *Northway*, 199.

9. *Division of opinion — certificate — amount.*] Under the acts of Congress authorizing questions arising on a trial or hearing before two judges in the Circuit Court, and upon which they are divided in opinion, to be certified to the Supreme Court of United States for decision, each question certified must be one of law, and not of fact, nor of mixed law and fact, and it must be a distinct point or proposition clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other. In an action of debt on sec. 5198 U. S. Rev. Stat., to recover twice the amount of interest, at the rate of nine per cent, received by a National bank in Pennsylvania, upon the discount of notes, where plaintiffs had judgment for $2,150.38, *held*, that this amount was insufficient to give jurisdiction to the Supreme Court of the United States. *Williamsport National Bank* v. *Knapp*, 184.

10. *To quiet title — bill in equity — quit-claim deed — equitable title.*] A Circuit Court of the United States has jurisdiction to quiet the title of a purchaser of land, as against a deed averred by the bill and not denied by the answer to be void on its face. Where R. holds an estate subject to mortgage and other liens for its full value in the hands of B., and is adjudicated a bankrupt, if no debts have been proved against his estate, and he is discharged, and his assignee in bankruptcy has fully settled his estate, a quit-claim deed by R. to B. vests a clear equitable title, and B. may maintain a bill in equity against R. to quiet the title. *Reynolds* v. *First National Bank of Crawfordsville*, 131.

JURISDICTION — (*Continued*).

11. *Transfer of stock — liability of assignor.*] On the sale of shares in a National bank, the name of the assignee not having been inserted in the blank left for that purpose in the transfer-book of the bank, and the assignors having been compelled, in a suit brought by a receiver, to contribute as owners of such shares toward the liabilities of the bank, the assignors brought this suit against their assignee to recover the amount so paid. *Held*, that the action was not within the jurisdiction of a Federal court. *Lessassier* v. *Kennedy*, 288.

See DIRECTORS, 594; USURY, 558, 561.

LIEN.

On its own stock.] A National bank, organized under the law of 1864, cannot, even by specific provisions for the purpose in its articles of association and in its by-laws, acquire a lien on its own stock held by its debtor. *Delaware, Lackawanna and Western Railroad Company* v. *Oxford Iron Company*, 582.

LIQUIDATION.

1. *Fraud — bill for relief — amendment — parties — creditors' bill — changing parties — limitations — liability of stockholders — revival — transfer not on books — powers in liquidation — guaranty — interest — deposits — demand — costs — receiver — creditor not appearing.*] A bill filed against a National bank and its president, H., alleged that the voluntary liquidation of the bank was fraudulent; that H. had fraudulently appropriated the funds of the bank; and prayed that all sales or transfers by the bank or its president be set aside. The evidence showed that certain of the stockholders had fraudulently conveyed their stock to H., receiving therefor property of the bank. The complainants amended their bill, bringing in all the stockholders, alleging a conspiracy between certain stockholders and H. to commit this fraud, and asking relief, and an accounting of the indebtedness of the bank, and the amounts due from the stockholders to the complainants under the National Banking Act. *Held*, that the allowance of the amendment was within the discretion of the courts. The act of Congress of June 30, 1876, section 2, provided that when any National bank went into voluntary liquidation, the statutory liability of the stockholders could be enforced by a bill in equity, in the nature of a creditors' bill, brought by a creditor on behalf of himself and all other creditors. The original bill was brought before this section; but it was in force at the time of the amendment. *Held*, that the act warranted the amendment. All the creditors having been permitted to join complainant, and the bill having been subsequently amended so as to allege expressly that it was made on behalf of complainant and all other creditors of the bank, *held*, not error, since under the original bill it would have appeared that there were other creditors, and the distribution would have been to each creditor his proportionate share. The statute of limitations ceased to run against all creditors who came in under the bill at any time. Under the National Banking Act, the individual liability of the stockholder survives as against the personal representatives of a deceased stockholder. A

LIQUIDATION — (*Continued*).

stockholder sold certain stock several months before the insolvency of the bank, but the transfer was not made on the books till the date of the bank's failure. *Held*, that the stockholder incurred the statutory liability. After the bank went into voluntary liquidation, several creditors took in payment of their claims paper belonging to the bank, with the bank's guaranty of payment, which paper was not paid. *Held*, that such creditors were not entitled to distribution of the assets obtained by enforcement of the statutory liability of the stockholders, because the bank, after liquidation, could not guarantee payment. Interest on the contracts, debts and engagements of the bank may be allowed as against the stockholders. The book accounts of depositors draw interest from the date of suspension. The master allowed twenty per cent of the amount of the debts, for expenses of the receiver appointed under the original bill, against the stockholders. *Held*, error. It was error to charge the stockholders with claims of persons who failed to appear and prove their claims. *Richmond* v. *Irons*, 211.

2. *New bank — stockholders' rights — estoppel — good-will.*] A National bank went into voluntary liquidation.] All the stockholders but one united in organizing a new National bank under a different name. He knew that the greater part of the assets were sold to the new bank, and he accepted dividends from nearly all such assets. *Held*, (1) that he had no right to share in the earnings of the new bank; (2) the old bank had no good-will to sell independent of the value of the unexpired lease of its banking-house. *First National Bank of Centralia* v. *Marshall*, 401.

LOANS.

Excessive — right to collect — evidence.] The prohibition of U. S. R. S., § 5200, that the total liabilities of any National bank to any person, company, corporation or firm for money borrowed, including in them "the liabilities of the several members thereof, shall at no time exceed one-tenth part" of the capital stock actually paid in, does not prevent a bank from recovering of a person to whom it has lent a sum greater than ten per cent of its capital stock, the excess of the loan over such limit. In an action on promissory notes by the receiver of a bank, where defendant alleged that he deposited with the bank as collateral security one hundred and seventy-three shares of stock of the Erie Tel. & T. Co., it appeared that defendant and another were authorized to consult with the Comptroller of the Currency in regard to the affairs of the bank, and that afterward defendant entered on each note in suit, "Secured by 173 shares Erie Tel. & T. Co." *Held*, that conversations between the committee and the Comptroller were admissible to show that this was done in good faith, and by the instructions of the Comptroller, but that it was incompetent for defendant to testify in his own favor as to what was said about collateral security and the condition of some of the notes in the bank so secured. A personal lettter written by defendant, which contained statements as to his financial relations with the bank, was properly excluded, when offered by him. *Corcoran* v. *Batchelder*, 491.

MARRIAGE.

1. *Married woman's liability as stockholder — party.*] Under the Married Woman's Act of 1869, Revised Statutes, D. C., a married woman may hold National bank stock, and is individually responsible as a stockholder, as if she were single, and this is true of stock acquired from her husband. In a suit to enforce such liability it is not necessary to join the husband. *Keyser* v. *Hite*, 340.

2. *Wife's separate property — mortgage.*] Where a married woman borrows money with the authorization of the husband, and the sanction and certificate of the judge, the creditor is not bound to show that the money was used for her separate benefit and advantage; but the debt may be enforced against her separate property mortgaged to secure it, unless she shows that with the knowledge or connivance of the lender the money was borrowed and used solely for the benefit of her husband. *Fortier* v. *New Orleans Nat. Bank; New Orleans Nat. Bank* v. *Fortier*, 140. *See* EQUITY, 316.

MISAPPLICATION.

Insolvent officer procuring discount of his own note — allowing debtor to withdraw his funds — willful misapplication of funds.] Where an insolvent officer of a National bank submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a willful misapplication of the funds of the bank under section 5209, U. S. Revised Statutes. A count that charges that defendant, the president of a banking association, failed to apply certain funds standing to the credit of a debtor of such association to the payment of his indebtedness, and permitted such debtor to withdraw his funds from the association and transfer them to another bank, does not charge a criminal misapplication by defendant of the moneys and funds of the association. *United States* v. *Britton*, 99.

MISTAKE.

1. *Correction — nudum pactum.*] Where by the mistake or oversight of the makers of a deed it is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under Bat. Rev., chap. 35, § 26; and a promise by the grantee to make such correction at his own expense and trouble would be *nudum pactum*. *Oldham* v. *Bank*, 688.

2. *In docket entry — correction by court — affidavit of clerk — evidence.*] Where the clerk in making the docket entries by mistake enters on the docket "copy of promissory note" instead of "promissory note," the court will direct the entry to be corrected, and the proper entry made; and the affidavit of the clerk is admissible to show that the docket entry was a mistake. *Parkhurst* v. *Citizens' Nat. Bank of Baltimore*, 463.

MORTGAGE.

1. *Foreclosure — who may bring suit.*] Where a note secured by mortgage is purchased by a bank, and indorsed to its cashier, he may sue to foreclose in his own name, under the Code. *Holmes* v. *Boyd*, 414.

MORTGAGE — (*Continued*).

2. *Future advances.*] No objection can be sustained against the validity of a mortgage taken by a National bank to secure future advances except by the government. A mortgage taken without notice of a prior unrecorded mortgage has priority of lien. *National Bank* v. *Whitney*, 5.
3. *Loan on.*] A loan of money made by a National bank on the security of a mortgage is not in violation of the National Banking Act. An objection to the taking by the bank of a mortgage lien as security for future advances can only be made by the United States. *Fortier* v. *New Orleans Nat. Bank*, 140.
4. *Power to purchase mortgaged land.*] A National bank may purchase, at sheriff's sale, land mortgaged to it as security for a previous debt. *Heath* v. *Second National Bank of Lafayette*, 406.
5. *Power to take, on sale of real estate.*] A National bank may sell its real estate and take a mortgage for the purchase-money. *New Orleans National Bank* v. *Raymond*, 457.
6. *Purchase of.*] A National bank lawfully holding a mortgage on real estate, may, to protect its interests, purchase a prior mortgage on the same real estate. *Holmes* v. *Boyd*, 414.
7. *Taking as security — effect.*] If a National bank discounts a note secured by deed of trust on real estate, the security passes to and may be enforced by the bank, subject only to forfeiture of its charter, which penalty can be invoked only by the United States. *Thornton* v. *National Exchange Bank*, 513.
8. *To secure future debts — evidence — power to take.*] A mortgage recited that it was "intended as collateral security for the payment of any indebtedness" of the mortgagors to the mortgagees, and provided that when the mortgagors "shall have paid all such indebtedness this mortgage shall become null and void." No indebtedness existed when it was executed, but one was subsequently incurred to about the sum specified in the mortgage. In an action by junior mortgagees to have their mortgage declared the first lien, *held*, that the real intention of the parties might be shown *aliunde;* and it appearing by such evidence that the mortgage was intended as a continuing security for future indebtedness, the action was not maintainable. A National bank may lawfully take a mortgage to secure future indebtedness. *Simons* v. *First National Bank of Union Springs*, 622.
9. *Ultra vires.*] A National bank may purchase a note in favor of a third party, and thereby acquire a collateral mortgage on land, and the claim may be incorporated with other indebtedness to the bank, and a new mortgage on land taken by the bank to secure the whole sum. *Oldham* v. *Bank*, 688.

NEGLIGENCE.

See DEPOSITS, 188; DIRECTORS, 594; STOCKHOLDER, 571.

NEGOTIABLE INSTRUMENT.

1. A National bank may recover upon negotiable paper purchased by it. *Merchants' National Bank of St. Paul* v. *Hanson*, 509.
2. *Notice of equities.*] The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner. *Id.*

NEGOTIABLE INSTRUMENT — (*Continued*).

3. *Pledge.*] Where the holder of bonds payable to bearer, transfers them to stock-brokers, to hold as margins on his individual stock transactions, and the brokers pledge them to a bank in the regular course of business, as security for current indebtedness, the bank acquires a valid title to them, and the owner cannot recover them, except by paying the amount for which they are pledged. *Thompson* v. *St Nicholas National Bank*, 663.

4. *Power to deal in.*] A National bank has no power to deal or speculate in promissory notes, or to acquire title thereto, except by discount. *First National Bank of Rochester* v. *Pierson*, 506.

NOTES.

Purchase — discount — notice to bank — knowledge of president.] A National bank may purchase negotiable paper. The private knowledge of the president of a bank of the failure of the consideration of a note purchased by it is not attributable to the bank. *First National Bank of Greenville* v. *Sherburne*, 882.

OFFICERS.

1. *Liability of bank for frauds of.*] Plaintiff, who was a depositor in a National bank, requested a certificate of deposit drawing interest for a portion of his deposit. The teller of the bank gave him a certificate which purported to be issued by B. & Co., a private banking firm, and informed him in the presence of the cashier of the bank that this was the bank's certificate, upon which assurance plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. *Held*, that the bank was liable to the plaintiff for the amount of his deposit. *Steckel* v. *First National Bank of Allentown*, 719.

2. ——.] Defendant, who had money on deposit in a National bank, when demanding payment thereof, was induced by an officer of the bank to sign a promissory note, which was represented to him to be a receipt for the money. He was unable to read English. *Held*, that he was not liable to the bank upon the note. *Resh* v. *First National Bank of Allentown*, 724.

3. ——.] Plaintiff, who was unable to read, deposited money in a National bank and took a certificate of deposit therefor, which the officers of the bank represented was a certificate of the bank. It was, on its face, the certificate of a private banking firm, composed of some of the officers of the bank. *Held*, that the bank was liable for the amount of the deposit. *Zeigler* v. *First National Bank of Allentown*, 721.

4. *Liquidation — stockholders as directors.*] Under the act of Congress, July 12, 1882, extending for the purpose of liquidation the franchises of such National banking associations as do not extend the periods of their charters, and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation. But after the expiration of the term of its charter, the stock of such an association is not transferable so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder, is ineligible as a

OFFICERS — (*Continued*).

director, under U. S. R. S., § 5145. *Richards* v. *Attleborough National Bank*, 495.

See CASHIER; RELEASE.

ORGANIZATION.

From State bank.] Where a National bank is in fact organized as the successor of a State bank with the consent of more than two-thirds of the stockholders, it may hold and own assets of its predecessor, although in form it was organized as a new bank, and the assets were transferred to it as if by sale and purchase. *Bank* v. *McIntire*, 707.

See CHANGE FROM STATE BANK.

PARTIES.

See DIRECTORS, 594.

Bank as pledgee of warehouse receipt in replevin.] A National bank having made a loan on the security of a warehouse receipt for merchandise, is a proper party defendant to a suit in replevin by the consignor and owner of the merchandise against the warehouse keeper. *Cleveland* v. *Shoeman*, 701.

PAYMENTS.

Application of.] Certain bonds were deposited by brokers with a bank, on the credit of which the bank, on the same day, certified and paid the broker's checks for a large amount. The brokers made cash deposits with the bank on the same day. On the morning of that day the brokers were indebted to the bank on a running account, which also the bonds were pledged to secure, but the securities were at all times insufficient to cover the entire indebtedness. *Held*, that in the absence of any express application of the cash deposits by the parties, the law applies them to the earliest items of the account, in preference to the indebtedness incurred by payment of the certified checks. *Thompson* v. *St. Nicholas National Bank*, 663.

PLACE OF TRIAL.

A National bank may be sued in the county where the plaintiff resides. *Talmage* v. *Third National Bank of the City of New York*, 103.

PLEADING.

1. *Complaint — cause of action — corporation — location — right of action — uniting legal and equitable causes of actions.*] The complaint alleged that the plaintiff is a corporation organized under the National Banking Act of the United States; that defendant made his promissory note for $5,000, payable to the plaintiff, at said bank, for value received, with interest, and containing an agreement which recites that the defendant "having deposited with the bank, as collateral security," a certain certificate of stock "giving the plaintiff full power in case of default in the payment of the note at maturity, to sell the stock at private or public sale, and apply the proceeds to the payment of the note;" that the note was not paid at maturity, and that the stock has not been sold or the lien foreclosed, and demands judgment for $5,000, and that the lien upon the stock be foreclosed, etc. *Held*, that the complaint alleges a good cause of action. The

PLEADING — (*Continued*).

complaint alleged that the plaintiff had done business in Buffalo, N. Y., upward of ten years, and the name "Farmers and Mechanics' National Bank of Buffalo," is recited in the complaint. *Held*, that there was sufficient to fix the location at Buffalo, N. Y., under Code Civ. Pro., § 1775. Although the plaintiff had the right under the agreement to sell the stock without action he may come into court and ask its direction. Under Code Civ. Pro., § 484, such as were formerly denominated legal or equitable, or both, may be joined in the same complaint. *Farmers and Mechanics' National Bank of Buffalo* v. *Rogers*, 683.

2. *Verification — attorney's clerk — joinder of causes — separately stating and numbering.*] A notary public, who is clerk of an attorney, may administer an oath to verify a pleading prepared by such attorney. Where several causes of action are set forth in a petition without being separately stated and numbered, it is error for the court to overrule a motion of the defendant to require the plaintiff to separately state and number his causes of action. This is a statutory right which, unless the defendant has waived, he may insist upon. *Schuyler National Bank* v. *Bollong*, 558.

See USURY, 558.

PLEDGE.

Of bank's own shares as security — estoppel.] Where a National bank made a loan upon the pledge of its own shares and afterward sold the shares to obtain payment of the loan, which exceeded the amount realized from the shares, *held*, that the owner of the shares could not, on the ground that the statute forbids a National bank to take its own shares as security, recover from the bank the amount realized upon the sale of the shares. *First National Bank of Xenia* v. *Stewart*, 96.

Of stocks.] *See* AGENCY, 603; NEGOTIABLE INSTRUMENTS, 663; STOCKHOLDERS, 122.

REAL ESTATE.

1. A National bank may take title to real estate in discharge of previous indebtedness. *Turner* v. *First National Bank of Madison*, 408.

See TRUST, 521.

2. *Power to purchase — creditors — liens — payment.*] A National bank may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted; and if in order to secure the same debt, it purchases other real estate not mortgaged to it, that does not affect the title to the land it was authorized to purchase. Where B. agrees with R. to pay R.'s debts which are liens upon his estate and satisfies the creditors, and takes an assignment of the liens to himself, R. cannot complain. *Reynolds* v. *First National Bank of Crawfordsville*, 131.

3. *Right to — authority of president — when bank required to pay president's note given in his own name.*] A National bank may purchase real estate to secure satisfaction of a debt due it even at a price considerably above the debt and from another than the debtor, and may take the title in the name of the president for its use. Where the president of a bank was

REAL ESTATE — (*Continued*).

long the general agent and manager of the affairs of the bank from its organization with the knowledge and approval of the directors, *held*, that he was warranted in purchasing real estate in satisfaction of suspended paper or a doubtful debt due to the bank in order to prevent loss. Land conveyed in trust to secure a note due a bank having been sold without redemption under a prior incumbrance, and Coolbaugh, the president of the bank, having bought it, taking a deed in his own name, for which he turned over the note due the bank and gave his individual note and deed of trust for the balance of the price, and the court on bill to foreclose the trust deed and cross-bill by the heirs of the president to require the bank to pay the note, having found that the land was bought by the president for the bank, as its agent, to secure a part of the debt, *held*, that the bank should pay the amount due and thereby release the estate of the maker of the note. *Libby* v. *Union National Bank; Coolbaugh* v. *Union National Bank*, 358.

4 *Security on.*] Real estate security taken by a National bank for present or future advances is valid. *Winton* v. *Little*, 725.

RECEIVERS.

Powers of.] The receiver of a National bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter or trade the assets. *Ellis* v. *Little*, 440. *See* REPLEVIN.

REDUCTION OF CAPITAL.

Surrender of stock — rights of stockholders.] The capital of a National bank having become impaired by the non-payment of the interest on some paper among its assets, to the amount of $71,000, in order to avoid an assessment by the Comptroller the stockholders reduced its capital stock, and carried the bills and notes to the account of suspended or "bad debts," which were not thereafter included as assets, although retained in its custody. Some years afterward the bank realized $75,000, from collaterals pledged for the security of that paper. In a suit by a stockholder to recover his share of the amount realized, proportioned to the amount of the stock surrendered, *held*, that he could not recover. *McCann* v. *First National Bank of Jeffersonville*, 434.

RELEASE.

By officer — acquiescence.] In 1872, a bank made a loan upon a note and confession of judgment signed also by sureties. The loan was negotiated by W., the president of the bank, and the note was made payable to "W., president or bearer," and the judgment stood in his name. To allow the principal debtor to sell a portion of the lands in 1874, W. executed a release of liens signed "W., president." In 1876, the note not being paid, execution was issued against the sureties. At their instance, the execution was enjoined and an issue framed between "W., president of the bank," and the sureties. This issue was tried in 1879. *Held*, that the long acquiescence of the bank in the acts of W. was a ratification of them, and it was bound by his release. *Winton* v. *Little*, 725.

REMOVAL OF CAUSES.

Federal question.] The act of Congress of July 12, 1882, repealing inconsistent acts, and providing that the jurisdiction of suits in which a National bank should be a party should be the same as if it were a State bank at the same place, prevents the removal of a cause in which a National bank is a party from a State to a Federal court on the mere ground that it is a National bank. *Leather Manufacturers' National Bank* v. *Cooper, Jr.*, 208.

REPLEVIN.

Receiver — sect. 5242, U. S. R. S.] A party claiming title to property in the possession of a receiver of an insolvent National bank, which came to his possession with other property belonging to the bank, may, upon his refusal to deliver the same, maintain an action of replevin therefor. Such a proceeding is not prohibited by sect. 5242, U. S. R. S. *Corn Exchange Bank* v. *Byle*, 634.

SAVINGS BANK.

1. *Conversion into National — evidence — consent — stock certificates.*] Under the act of Congress of June 30, 1877, a savings bank organized in this district under the General Incorporation Acts of May 5, and June 17, 1870, R. S. D. C., § 553, may convert itself into a National bank. The certificate of the Comptroller of the Currency is conclusive as to the regularity of such proceedings. A shareholder of a corporation is estopped to deny the existence of such corporation. The consent of the owners of more than two-thirds of the stock of a bank is sufficient for the conversion of the bank into a National bank. On the conversion of a National bank, it is not necessary to issue new stock certificates. *Keyser* v. *Hitz*, 340.

2. *Taxation of shares — constitutional law — shares owned by other National banks.*] Under Pub. Stat. Mass., chap. 13, § 8, which provides that all bank shares shall be assessed at their cash value, and at no greater rate than other moneyed capital in the hands of citizens, taxes are not invalid, either under Stat. Mass. or U. S. R. S., § 5219, because the tax on savings banks is based on the amount of their deposits, excepting deposits invested in loans secured on taxable real estate. A tax levied under Pub. Stat. Mass., chap. 13, § 8, is not "at a greater rate than other moneyed capital in the hands of citizens," because disproportionate and unequal to the tax imposed, under Pub. Stat. Mass., chap. 13, relative to the taxation of the corporate franchise of corporations excepting banks, on life insurance companies, based on the number of policies, on trust and like companies, based on the amount of deposits, and on telephone companies, based on the number of telephones used. Under U. S. R. S., § 5219, which provides that all the shares of any banking association may be included in the valuation of the personal property of the owner or holder in the State within which the association is located, but that each State may determine the manner of taxing the shares of National banks, a State may tax the shares of a National bank owned by another National bank. *National Bank of Redemption* v. *City of Boston*, 800.

SET-OFF.

See INSOLVENCY; USURY.

SHERIFF.

Amendment.] A sheriff may amend his return to process, by leave of the court, even after his term of office has expired. *Turner* v. *National Bank of Madison*, 408.

STATUTE OF LIMITATIONS.

See EXECUTOR, 707.

STOCK.

1. *Collusive transfer — individual liability of stockholder — enforcement of — party — interest — receivers.*] Where a stockholder in a National bank, aware that there is good ground to apprehend the failure of the bank, collusively transfers his shares to an irresponsible transferee, with design to escape individual liability, such transfer will not relieve him from such liability. The bill being one for discovery as well as relief, and the transfer being good between the parties, the case is one of equitable cognizance. A letter addressed to the receiver, and signed by the Comptroller of the Currency, directing him to institute legal proceedings to enforce the individual liability of every stockholder, under the statute, is sufficient evidence that the Comptroller decided, before the suit, that it was necessary to enforce the personal liability of the stockholders. The liability of the stockholders bears interest from the date of said letter. The decree of the Circuit Court, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as plaintiff, the new receiver becoming a surety in the appeal bond. In this court the new rece ver moved to be substituted as plaintiff and appellant, without prejudice to the proceedings already had, and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted, and the second denied. *Bowden* v. *Johnson*, 55.

2. *Increase — change of increase — rights and liabilities of shareholders — subscription — payment — discharge of liability.*] Where a National bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it may reduce the amount of the increase to the amount actually paid. Where a shareholder of a National bank subscribes to and pays for a certain increase of stock, and the bank afterward reduces the amount of the increase, and he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the Comptroller of the Currency provided for in section 5205, U. S. Revised Statutes, he is estopped to deny his liability as a subscriber to the reduced amount. The payment of an assessment imposed by a bank on its shareholders under section 5205, U. S. Revised Statutes, in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability under section 5151, U. S. Revised Statutes, for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares. *Delano* v. *Butler; Same* v. *Same*, 163.

STOCK — (*Continued*).

3. ——— ———.] A National bank determined to increase its capital stock from $300,000 to $500,000. The new stock subscriptions amounted to only $130,060. The bank advertised an increase to $430,060. This was never authorized by vote of the stockholders, nor certified to or approved by the Comptroller of the Currency. The plaintiff subscribed and paid $2,000 for so much of the originally proposed increase. *Held*, that plaintiff did not become a stockholder, and when the bank became insolvent was entitled to judgment against the receiver for the amount so paid. *Schierenberg* v. *Stephens*, 528; *Nichols* v. *Stephens*, 589.

4. *Ownership.*] L. was president of the defendant National bank, and had substantial control and management. He bought fifty shares of defendant's outstanding stock, and paid for it with the proceeds of a note, signed by M., the cashier, which he indorsed and placed in the bank as discounted paper. He afterward bought one hundred and forty-eight shares, and paid for them by an ordinary call-loan from defendant. On subsequently selling a portion of the stock, L. applied the proceeds to the note and call-loan. He did not assume to act for defendant, and the stock was transferred to him individually, and was in his name on the books. He had no actual authority to buy the stock for defendant; but the evidence tended to show that the purpose of the purchase was to get the stock into the hands of persons who would be useful to defendant. In an action for fraud in a subsequent sale of such stock by L., *held*, that defendant could not be charged as owner of the stock. On the question whether the president represented defendant to be the owner of the stock, plaintiff testified that in the conversation resulting in the sale, the president stated that "we can sell you some of our stock" at 160, and that that was "the price that the bank took it in at." Plaintiff did not inquire as to the ownership. The president testified that while he might have stated that "we have some stock," his best recollection was that he did not say "the bank took it in." No motive appeared for his representing defendant to be the owner. *Held*, that the evidence sustained a finding negativing such representations. *Prosser* v. *First National Bank of Buffalo*, 646.

5. *Purchase by bank of its own.*] The owner of shares in a National bank, which he believed to be solvent, sold them to a broker for a consideration, executing a power of attorney in blank, authorizing their transfer on the books of the bank. The shares were purchased by the broker, but without knowledge of the owner, for the president of the bank. The latter caused the name of his clerk to be inserted as attorney, the clerk then transferring the shares to the president as trustee on the bank's official stock register. The president purchased the stock for the bank and with its funds. The clerk knew of this fact, but neither the broker nor the owner knew it. *Held*, that the sale to the broker could not be impeached as in violation of the statute forbidding the purchase by a National bank of its own shares. *Johnston* v. *Laflin*, 13.

See AGENCY, 603.

STOCKHOLDER.

1. *Action against directors for negligence.*] A stockholder in a National bank cannot maintain an action against the president and directors for their neglect and mismanagement of the affairs of the bank, whereby insolvency ensued and the stock became worthless. *Conway* v. *Halsey*, 571.
2. *Liability — purchaser from former owner — transfer not made on books — "shareholder" liable for debts.*] Where a National bank issues certificates of its shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-law in regard to a transfer on its books, so far as creditors of the bank are concerned a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking Law. *Laing* v. *Burley*, 369.
3. *Individual liability — transfer of stock.*] In an action against the executors of a deceased shareholder of a National bank to hold the estate liable for debts of the bank, which had become insolvent, it appeared that the defendants had, before the failure of the bank, sold the stock and received the pay for it, and surrendered the certificates and power of attorney for transfer to the president, who knew all the facts and the name of the purchaser, but who neglected to make the transfer on the books of the bank. *Held*, not maintainable. *Whitney* v. *Butler*, 177.
4. *Liability for deficiency of insolvent bank.*] Under the National Bank Law (U. S. R. S., § 5151) in case of insolvency of a bank and a deficit, each stockholder may be assessed such sum (not exceeding an amount equal to the par value of his stock), as will bear the same proportion to the whole amount of the deficit, as his stock bears to the whole amount of the capital stock of the bank, at its par value. The inability of some of the stockholders to contribute to the assessment will not increase the amount of his liability. *United States, ex rel. Citizens' National Bank of Louisiana*, v. *Knox*, 1.
5. *Liability of pledgee.*] In the absence of actual fraud or bad faith, the mere pledgee of stock of a National bank is not chargeable as a stockholder, in the event of its failure, where he is not registered as owner. *Anderson* v. *Philadelphia Warehouse Co.*, 122.

See DISSOLUTION, 20; REDUCTION OF CAPITAL, 434; STOCK, 55.

SUBSCRIBERS.

See STOCK.

SURETY.

1. *Forbearance.*] The failure of a creditor to revive a judgment does not discharge a surety unless there was an express agreement at the time of giving the judgment that it should be kept revived for the benefit of the surety. *Winton* v. *Little*, 725.
2. *Securities taken by surety — tender of debt discharges lien.*] Securities taken by sureties for their indemnity, inure to the benefit of the creditor. Where two deeds of trust were given to secure several notes, all held by

SURETY — (*Continued*).

different persons, and it was provided in each deed that if the grantor should pay one-half of the debt and interest expressed in the notes, the deed should become void, and the grantor in one of the deeds tendered to the holder one-half of his note and interest, and the holder refused the tender; *held*, that as to that note the lien of the deed of trust was discharged. *Thornton* v. *National Exchange Bank*, 513.

TAXATION.

1. *Assessment — bank shares — constitutionality.*] Section 7, chap. 302, Laws of 1859, requiring the deputy tax commissioners to personally examine "each and every house, building lot, pier and other accessible property," and furnish the commissioners of taxes a detailed statement of the same, etc., as such commissioners may require, etc., refers only to real property. The oath required by the act to be made by the deputy to the statement returned to the commissioners may be taken at any time after examination of the property and before the filing of the statement on the second Monday of January thereafter. The entry of assessments for National bank shares upon a list or book separate from other assessments for personal property against individuals in the city of New York does not render the assessment void, and does not violate section 5219, U. S. R. S. The assessment and collection of taxes constitute due process of law within the meaning of the Constitution. *In re McMahon* v. *Palmer*, 636.
2. *Injunction — offer.*] A court of equity will not enjoin the collection of a local tax upon National bank shares on the ground that the assessment is partial, unequal and unjust, as compared with that upon other property, there being no offer to pay any tax, and the effect of an injunction being to declare the whole tax of a State for the year void. *German National Bank of Chicago* v. *Kimball*, 9.
3. *Constitutionality.*] In a statute which contains invalid or unconstitutional provisions, capable of separation from the valid, only the former are to be disregarded. A statute of New York in relation to taxation required the assessors to assess to each tax payer his real estate at its value and his personal estate at its full value after deducting debts owed by him. It further provided that if before the assessments are completed he shall make affidavit, "that the value of the personal estate owned by him after deducting his just debts, and his property invested in the stock of any corporation liable to be taxed therefor, does not exceed a certain sum to be specified in the affidavit, it shall be the duty of" the assessors to value such personal estate at the sum specified in such affidavit and no more. Another statute provided that shareholders in National and other banks should be assessed on the value of their shares, but a deduction of their indebtedness was not allowed. The Federal statute permits shares in National banks to be taxed by a State only at the same rate as other money capital of the citizens of the State. *Held*, that the statute in relation to taxing shares of National banks was a valid rule of assessment for the shareholders of such banks having no debts to deduct, not being in conflict with the Federal statute in respect to such shareholders. *Held*,

TAXATION — (*Continued*).

also, that in the absence of the affidavit above provided for, assessors had authority to assess a shareholder in a National bank the full value of his shares. *Supervisors of Albany* v. *Stanley*, 33.

4. ——.] The Iowa statute which taxes savings banks on the amount of their paid-up capital, and does not tax the shares of those banks held by individuals, the same rate being assessed upon the capital of the savings banks as upon the shares of the National banks, and the tax upon the former not being shown to be less than that upon the latter, is not invalid. *Davenport National Bank* v. *Board of Equalization, City of Davenport, Iowa, and Others*, 285.

5. *Deductions — injunction.*] The Indiana statute relating to taxation provides that a tax payer may, in estimating his taxable property, deduct his indebtedness from his "credits or money at interest;" "all other demands against persons or body corporate;" "total amount of all credits." *Held*, that the shares in a National bank, subjected to State taxation, were entitled to a deduction of indebtedness, and an injunction would lie to restrain the collection of a tax upon such shares where such deduction was not allowed. *Evansville National Bank* v. *Britton*, 48.

6. *Discrimination — bank stock — constitutional law — remedial statute.*] A county assessor assessed the stock of all the banks in the county, both State and National, at the par value. The actual value of the shares of the National Albany Exchange Bank was from twenty-five to thirty per cent above par. The actual value of the shares of all the banks in the county, with one exception, was above par from ten to over one hundred per cent. In a suit by a shareholder of said National bank, to recover the amount paid upon his stock on the ground of discrimination, *held*, that the discrimination not being designed by the assessor, the assessment was valid. Where the assessors are required by statute to complete the assessment-roll by a certain date, and to make oath to it in a prescribed form, and these requirements are necessary to enable notices to be published specifying a time when they would meet to review the assessments on the application of any person aggrieved, the non-completion of the assessment-roll by the specified date, and departure from the prescribed form of oath, may be cured by remedial statute subsequently enacted, providing the right of the tax payers aggrieved by the assessment to have their objections passed upon is saved. *Williams* v. *Board of Supervisors of the County of Albany*, 278.

7. —— *deduction of indebtedness.*] An order made by the Ohio State board for the equalization of returns of bank shares from the various counties for purposes of taxation, increasing the assessment of shares of a National bank above that of other property in the county, is invalid within U. S. R. S., § 5219, providing against discrimination against such banks in State taxation. Under U. S. R. S., § 5219, where the laws of a State allow a tax payer owning moneyed capital to make a deduction from the amount assessed against him of his *bona fide* indebtedness, no such provision being made for the indebtedness of holders of bank stock, they are entitled to such deduction, although they omitted to make de-

mand therefor till after the return of the shares for assessment and the session of the State board of equalization. *Whitbeck* v. *Mercantile National Bank of Cleveland*, 309.

8. *Exemption — assets in receiver's hands.*] The personal assets and personal property of an insolvent National bank in the hands of a receiver appointed by the Comptroller of the Currency, in accordance with the provision of section 5234 of the United States Revised Statutes, are exempt from taxation under State laws. *Rosenblatt* v. *Johnston*, 82.

9. *In Territories — equalization.*] Shares of National banks in the Territories are taxable like other personalty. In Minnesota stocks or shares in any bank or company are taxable except where the entire capital stock is invested in property assessable in the Territory; in Bow county mining claims not patented were not taxed, and when patented were assessed at $5 an acre; the entire capital of a large number of mining companies were assessable, and part of their property was mining claims; defendant's shares of bank stock were assessed at the market value. *Held*, that there was no discrimination. *Commissioners of Silver Bow County* v. *Davis*, 546.

10. "*Moneyed capital*" — *trust companies — savings banks — municipal bonds — stocks of foreign corporations.*] The New York act of July 1, 1882, § 312, declaring that the stockholders in banks organized under the authority of the State, or of the United States, shall be assessed for the value of their shares of stock, is not inconsistent with U. S. R. S., § 5219, forbidding the taxes assessed on the stockholders to be at a greater rate than those assessed on other moneyed capital in the hands of individual citizens of the State, although the assessment-rolls showed that the securities of life insurance companies, the stock of corporations incorporated under the laws of New York, the deposits of savings banks, the stock of trust companies, the stock of companies created outside of the State and owned in the State, virtually escaped taxation. *Mercantile National Bank of New York* v. *Mayor, etc., of New York*, 243.

11. ——.] The New Jersey act of April 11, 1866, section 15, exempts from taxation thereunder corporations which, by virtue of any contract in their charters, or other contracts with this State, are expressly exempted from taxation, except mutual life insurance companies specially taxed, and deposits in savings banks. *Held*, that the assessments of the National banks were not invalid by reason thereof. *National Newark Banking Co.* v. *Mayor, etc., of City of Newark*, 265.

12. *Shares — California Code.*] The provision of section 3640 of the California Political Code, as amended March 22, 1880, so far as it applies to National banks, is in violation of section 5219, U. S. R. S., forbidding the taxation of National bank shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. *Miller* v. *Heilbron*, 330.

13. *In what name.*] There is no authority in the statutes of the State, nor of the United States, for listing and valuing the shares in a National bank in the aggregate, and placing such aggregate on the tax-list in the name

TAXATION — (*Continued*).

of the bank. Such shares when listed and valued for taxation are required to be placed on the proper tax-list in the names of the respective owners. The listing of the shares for taxation is provided for and secured by section 2765, R. S., and the correction of returns made by the cashier of the bank to the county auditor is provided for by section 2769 and not by section 2782, Id. *Miller* v. *First National Bank; Same* v. *Third National Bank; Same* v. *Merchants' National Bank*, 711.

14. *Stock.*] The Revenue Act of North Carolina (Act 1885, chap. 177, § 12) enumerates what shall be deemed "solvent credits," and provides that the party taxed "may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor." *Held*, that the holder of stock of a National bank located in said State was entitled to deduct his indebtedness from the valuation of his shares of said stock, although National bank stock was not included in the statute enumeration of "solvent credits." *McAden* v. *Commissioners of Mecklenburg County*, 694.

15. *Allowance for debts of holder.*] In the assessment and taxation of shares of National bank stock, the owners thereof, having no other credits or moneyed capital, are entitled to deduct their *bona fide* debts from the value of such shares of stock. *Bressler* v. *Wayne County*, 564.

16. *Deduction of debts — discrimination — judicial notice.*] Where a tax law of a State allows tax payers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the State in the hands of its citizens, but denies to the owners of National bank stock the right to deduct their debts from the assessed value of such stock, it is an invalid discrimination under section 5219, United States Revised Statutes. Courts will take judicial notice that the moneyed capital from which the tax payer may so deduct his debts is a material portion of the whole moneyed capital of the State. *Wasson* v. *First National Bank of Indianapolis*, 419.

17. *Refusal of officers to furnish list.*] Assessment of taxes against National bank stock must be made against the shareholders personally, and the refusal of the officers of the bank to furnish the assessor with a list of shareholders does not justify making the assessment and enforcing the tax against the property of the bank. *City of Springfield* v. *First National Bank of Springfield*, 524.

18. *Uniformity — valuation — rule of assessors — excessive assessments — relief.*] Laws of New York, April 23, 1866, chap. 761, providing for the taxation of shares of stock in National banks, is in conflict with the act of Congress (R. S., § 5219) prohibiting such taxation at a greater rate than is imposed by the State upon other moneyed capital in the hands of individual citizens of such State, in so far as it does not permit a stockholder of a National bank to deduct the amount of his just debts from the assessed value of his stock; but such assessment is not therefore invalid unless the stockholder has shown the assessors what his just debts are, and has taken the requisite steps to have his assessment made out in accordance therewith. The rule adopted by the board of assessors of the city of Al-

TAXATION — (*Continued*).

bany, to assess all shares of stock in State and National banks in the city of Albany at par, without regard to their actual or market values, but making the requisite reduction for real estate owned by the banks, is not in conflict with the National Bank Act. Excessive assessments should be corrected by the statutory course or by injunction. *Stanley* v. *Board of Supervisors of the County of Albany*, 268.

19. ——.] National bank shares may not be subjected to State taxation, where a very material relative part of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempted from such taxation. Capital invested in National bank shares was intended by Congress to be placed on the same footing of substantial equality in respect of taxation by State authority as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. *Boyer* v. *Boyer*, 151.

TENDER.

See AGENCY, 608.

TRIAL.

On bill and answer — replication.] After the setting of the case down for hearing on bill and answer, after a cause has been so set down, a motion to dismiss the suit for want of timely filing of the replication is too late. *Reynolds* v. *First National Bank of Crawfordsville, Indiana*, 131.

TRUST.

Dealings with real estate.] To avoid the supposed effect of certain provisions of the National Banking Act, a National bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee, for a receiver of the bank, was valid. National banks may hold and convey real estate which they purchase at sales under judgments, decrees or mortgages held by them, to secure debts due them. If a National bank violates the National Banking Act in dealing with real estate, the government alone can take advantage of it. *Wherry* v. *Hale*, 521.

UNITED STATES.

As creditor.] *See* INSOLVENCY, 68.

USURY.

1. Usurious interest actually paid to a National bank on renewal of notes, may not be set off in an action on the notes. *Driesbach* v. *Second National Bank of Wilkesbarre; Stark* v. *Same*, 19.

2. *Action for double interest — agreement.*] In an action under U. S. R. S., § 5198, against a National bank to recover twice the amount of usurious interest taken on loans made by it to McRae, the defendant proved an oral agreement between it and McRae, whereby the latter agreed to settle and discharge all such claims against defendant, that the same be applied in payment of that part of his indebtedness to the bank not collected by it from any other source, and that he would not sue or allow suit

to be brought against the bank on account of such illegal interest. In consideration thereof the bank agreed that it would satisfy so much of the indebtedness of McRae as remained after applying all other available collections, or would consent as a creditor to his discharge in bankruptcy, as he might request. At the time of the agreement, McRae was indebted to defendant in a large amount, and after applying all collections there remained due a sum much larger than the excessive interest, none of which indebtedness has been paid. *Held*, that the agreement operated as an immediate discharge and satisfaction of the claim of McRae against defendant. Inconsistent action by the defendant, subsequent to the agreement, did not affect its legal operation. *Morehouse* v. *Second National Bank of Oswego*, 631.

8. *When interest accrues — bankruptcy — who may sue.*] The right of action to recover double the amount of usurious interest paid to a National bank, as provided by section 5197 of the National Banking Act, accrues upon the actual payment by the borrower of the amount of the illegal interest to the bank, and can be maintained whether the debt has been paid or not. The party paying such illegal interest cannot recover for it after his discharge in bankruptcy, but the right of action vests in the assignee. *Monongahela National Bank* v. *Overholt*, 735.

4. *Interest paid — jurisdiction — set-off.*] State courts have jurisdiction in actions against National banks to recover back the penalty imposed upon such banks for taking usurious interest. No bank in Pennsylvania can lawfully take more than six per cent interest. The person paying usurious interest may recover twice its amount, although the principal is not paid. In such suit the plaintiff may recover twice the entire amount of interest paid. In such suit the defendant cannot set off a judgment held by it against the plaintiff. *Lebanon National Bank* v. *Karmany*, 746.

5. *Pleading — jurisdiction — venue.*] When an action is brought to recover a penalty under sections 5197 and 5198, United States Revised Statutes, for taking, receiving, reserving or charging a rate of interest greater than is allowed by law, it is necessary to allege in the petition that the act was "knowingly done." An action to recover a penalty under section 5198 may be brought in any court in the city or county in which such bank is located, having jurisdiction in similar cases. *Schuyler National Bank* v. *Bollong*, 558.

6. *Conflict of laws.*] One who procures the discount by a National bank of promissory notes of others, held by him, he indorsing the same, at an unlawful rate of interest, may maintain an action to recover back from the bank twice the amount of such interest, under the provisions of the United States Revised Statutes, section 5198, giving the right to such an action, and this notwithstanding the transaction would not, under the law of the State where the bank is located, be usurious if between private persons. *National Bank of Gloversville* v. *Johnson*, 251.

7. *Effect on note.*] Where a National bank takes, receives or charges more than the legal rate of interest in the discount of a note, the interest-bearing power of the note is destroyed, and remains destroyed until it is paid. Reid gave Guthrie a judgment note for the latter's accommodation. Guthrie

procured it to be discounted by a National bank at a usurious rate of interest. *Held*, that defendant could avail himself of the usurious discounts charged by the bank as a defense to the payment of interest. *Guthrie* v. *Reid*, 751.

8. *Limitations.*] In an action in a State court by a National bank upon a note upon which the bank has received usurious interest, the defendant may set off the forfeiture provided by the National Bank Act, although the suit is in another State than that where the note was discounted, and more than two years after the discount. *First National Bank of Peterborough* v. *Childs*, 465.

9. *Interest after due.*] Under act of Congress June 3, 1864, § 30, providing that National banks knowingly receiving or charging a greater rate of interest than allowed by the State where the bank is located, shall forfeit the entire interest which the note carries with it, or which has been agreed to be paid thereon, not only is forfeited a greater sum reserved by the bank out of the money than the legal interest for the time the note has to run, but also the interest accruing by law upon non-payment after maturity. An agreement to pay illegal interest in a mortgage given to secure the notes after maturity, forfeits both legal and illegal interest, though no interest is expressed in the notes themselves. *Alves* v. *Henderson National Bank*, 452.

10. *Set-off — limitation.*] Where a National bank has actually taken usurious interest, the party paying it may recover double the amount in an action therefor, but cannot set off or counter-claim it in an action to recover the principal; and the action for such penalty must be brought within two years. *Ellis* v. *First National Bank of Olney*, 378.

11. *State courts — jurisdiction.*] The courts of record of the several States have jurisdiction in actions brought under sections 5197, 5198 of the Revised Statutes of the United States, to recover from National banks the penalty for knowingly taking, receiving, reserving or charging a rate of interest greater than is allowed by law. Where the usurious interest is discounted from the face of the note, the bank can only recover the face of the note less the interest deducted. If the borrower pays the usurious interest in advance, he may recover double the interest so paid. *Schuyler National Bank* v. *Bollong*, 561.

12. *Recovery of lawful interest.*] The taking of usurious interest under section 5197 of the Revised Statutes of the United States, and the Pennsylvania act of May 28, 1858, does not prevent the recovery of the lawful interest. *Appeal of Second National Bank of Titusville; Henderson, to use of Second National Bank of Titusville*, v. *Waid*, 740.

13. *Set-off.*] In an action by a National bank upon a note, the defendant is not entitled to any set-off for illegal interest exacted by the bank upon the discount thereof, but the bank can recover only the principal of the note. *Peterborough National Bank* v. *Childs*, 469.

14. ———.] Usurious interest previously received by a National bank in the course of renewals of a series of notes, terminating in one upon which suit is brought, cannot be pleaded by way of set-off or payment, but the

USURY — (*Continued*).

only remedy is separate action for double the interest paid by him. *Oldham* v. *Bank*, 688.

15. ———.] Where usurious interest has been paid to a National bank on renewal notes, and the bank brings suit on the last note, the defendant may not set off such illegal interest, but his only remedy is by an action against the bank to recover the penalty prescribed by the National Bank Act. *National Bank of Fayette County* v. *Dushane*, 789.

16. ——— *remedy.*] In an action by a National bank on a promissory note discounted by it, the defendant may not counter-claim or set off usurious interest taken by the bank on the discount of it and other notes of which it was a renewal. The remedy is an action of debt to recover back twice the amount paid. The practice and pleadings prescribed by the Legislature of the State in regard to a counter-claim or recoupment may not be used to defeat the intention of a Federal enactment. The provision of the United States Statutes (§ 914) that the practice, pleadings, forms and modes of proceedings, in civil causes, in the Circuit and District Courts, shall conform, as near as may be, to those existing at the time in the courts of record of the State, has no application in such case. Where a National bank has usuriously reserved a sum greater than the lawful rate of interest on a discount, the amount so reserved is forfeited, and may not be recovered in an action upon the note. *National Bank of Auburn* v. *Lewis*, 587.

VERDICT.

When it must fix the exact amount.] The provision of Civil Code of Kentucky, § 329, that a general verdict that either party is entitled to recover money of the adverse party must assess the amount of recovery, does not apply where the amount is not disputed, but involves simply an arithmetical calculation. *Logan County National Bank* v. *Townsend*, 448.

WAREHOUSE RECEIPT.

Power to lend on security of.] A factor holding a warehouse receipt for the delivery of merchandise consigned to him by the owner to sell on commission, in order to obtain a loan from a bank, gave to the bank his negotiable promissory note, and as collateral security therefor (and not to secure any antecedent debt or demand), duly transferred and delivered to the bank the warehouse receipt, and made an agreement with the bank for the disposition of the merchandise. *Held*, that under the act of March 12, 1844 (1 S. & C. 420), if the bank in good faith loaned the money, and took the warehouse receipt, and made said agreement, upon the faith that the factor was the true owner of the merchandise, such transfer and agreement were valid, and the bank was entitled to hold the merchandise as security for the payment of the note. *Cleveland* v. *Shoeman*, 701.

WRIT OF ERROR.

Finding of fact.] Where a case is tried by the Circuit Court of the United States without a jury, the findings of the court upon questions of fact are not reviewable in the Supreme Court on a writ of error. *Stanley* v. *Board of Supervisors*, 268.